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MUTUAL LEGAL ASSISTANCE TREATY CONCERNING THE CAYMAN ISLANDS

SEPTEMBER 30 (legislative day, SEPTEMBER 26), 1988.—Ordered to be printed

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-8]

The Committee on Foreign Relations, to which was referred the treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters, with protocol, signed at Grand Cayman, Cayman Islands on July 3, 1986, together with related notes exchanged at London the same day, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

BACKGROUND

The negotiation of mutual legal assistance treaties [MLAT's], treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be of assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit infor-

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mation provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

Since the MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdon. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step toward agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each have been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, Mexico, Belgium and the Cayman Islands have been signed but not yet ratified by the United States.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) they fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts; and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLAT's are designed to streamline and make more effective the process of obtaining evidence. Each treaty provides for a Central Authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and uniformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

United States law enforcement officials have experienced enormous frustration in following the paper trail of illicit activities once it leads to offshore financial secrecy jurisdictions. Until recently, there were few options available to law enforcement agents, and the one most commonly used, the extraterritorial application of U.S. law, has often resulted in substantial foreign policy dis-

putes. The Cayman Islands are highly dependent on their banking secrecy status for revenues. In 1964, the Cayman Islands had two banks and no offshore business. By 1981, the Caymans had 360 branches of United States and foreign banks and over 8,000 registered companies.

Efforts to pierce the financial secrecy laws of the Cayman Islands have led American prosecutors to subpoena Caymand Island bank officers and public officials while they were in the United States. In 1976, a case involving a Caymanian banker who was compelled to give testimony before a United States grand jury, led the Cayman Government to tighten its financial secrecy laws and increase the sanctions for unauthorized disclosure. The case also brought into play the British Government on behalf of its dependency.

As discussions among the United States, the British and the Caymanians got under way, the United States was successful in persuading the British Ministry for Foreign and Commonwealth protecting the proceeds of narcotics traffickers. Not until 1984, was an agreement signed under which the United States agreed to limit the scope to narcotics-related prosecutions and to waive their preorgative of obtaining a subpoena. In return, the Caymanians agreed to unrestricted cooperation in narcotics cases. A further provision in the 1984 agreement committed the parties to begin negotiations on an MLAT within a year, the product of which is subject of the report.

The Cayman agreement, although limited to narcotics cases, was viewed by some U.S. officials as preferable to a full-scale MLAT. Unlike the MLAT with the Swiss, there were not extensive procedural hurdles to overcome. The agreement also required that any U.S. request be kept confidential by the Cayman Government and the provider of documents. The typical MLAT requires that a request be accompanied by supporting documents. The Cayman agreement merely required that the U.S. Attorney General certify that the request was within the scope of the agreement.

In accordance with the provisions of the agreement, the United States, British, and Cayman Governments began negotiations on an MLAT in 1985. On July 3, 1986, a completed MLAT was signed, marking the first such treaty between the United States and a Caribbean financial secrecy jurisdiction, and the first MLAT signed by the British. The major advantage of the MLAT is that it no longer limits cooperation to drug cases. In addition, certain activities which are not criminal violations of the law of the Cayman Islands but which are offenses under U.S. law are covered (e.g. insider trading and violations of the Foreign Corrupt Practices Act).

Unlike other MLAT's which impose conditions of confidentiality only when necessary, this treaty provides that all information or evidence furnished under the treaty shall be treated as confidential except when disclosure is necessary for purposes of prosecution of an offense described in the request.

Purpose

The treaty provides for assistance in all matters involving "the investigation, prosecution, and suppression of criminal offenses."

The treaty thereby permits mutual assistance at the investigative stage (such as grand jury proceedings), as well as after formal charges have been filed. It also provides for assistance in civil and administrative proceedings relating to narcotics trafficking.

The treaty generally conditions assistance on a showing of "dual criminality", that is whether the assistance being sought relates to an activity which would constitute some criminal offense if committed in the requested state. The treaty permits assistance to be granted in eight specific areas without regard to dual criminality: any matter which constitutes racketeering; drug trafficking; fraud in connection with tax shelters; tax evasion or filing false statements with respect to illegally obtained income; failing to report transfer of illegally acquired money; insider trading in securities; fraudulent securities practices; and violations of the Foreign Corrupt Practices Act. The treaty does not permit assistance in any matter directly or indirectly related to the imposition, calculation, or collection of taxes unless the case deals with fraud in connection with tax shelters, or tax evasion or filing false statements with respect to illegally obtained income.

The kinds of assistance provided for under the treaty include but are not necessarily limited to: taking testimony and statements; obtaining documents, records and evidence; executing requests for searches and seizures; immobilizing criminally obtained assets; and assistance in proceedings related to forfeiture, restitution and collection of fines.

Committee Comments

The committee believes that Mutual Legal Assistance Treaties [MLAT's] are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. The Cayman Islands is a favorite location for money launderers because of its bank secrecy laws. This treaty will facilitate U.S. efforts to obtain bank records and other evidence of money laundering and narcotics trafficking.

During committee consideration of the Treaty with the Cayman Islands, as well as the other five pending MLAT's, concern was expressed that the bilateral treaties could in some manner abridge the constitutional rights of U.S. citizens. A reservation was proposed to each of the MLAT's asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the 'Constitution over a treaty," *Reid* v. *Covert,* 354 U.S. 1, (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumscribes the Government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instrument of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they prop-

erly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the U.S. wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also raises dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT requests where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendants to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign government did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inappropriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as bank records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already well regulated by the courts. In roughly a decade's experience under the existing MLAT's, no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty.

Committee Action

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from Administration witnesses, Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988 the committee held another hearing at which the following public witnesses presented testimony:

Mr. Bruce Zagaris, Attorney, Berliner & Maloney, Washington, DC; Mr. Robert L. Pisani, Executive Director, International Legal

Defense Counsel, Philadelphia, PA; Mr. Philip White, Attorney, Adam, McCullough & Beard, Washington, DC. The hearing record on all six pending MLAT's is printed as an appendix to this report.

The Committee met to consider the Treaty between the Government of the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands relating to Mutual Assistance on September 27, 1988. Senator Helms offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3–15 vote with Senators Helms, Pressler and Trible voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans, and McConnell voting in the negative.

The committee voted by voice vote with a quorum present to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent.

Section-by-Section Analysis

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

TECHNICAL ANALYSIS OF THE TREATY BETWEEN THE UNITED STATES AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING THE CAYMAN ISLANDS RELATING TO MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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Technical Analysis of the Mutual Legal Assistance Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands

On July 3, 1986, the United States, the United Kingdom, and the Cayman Islands signed a treaty on mutual legal assistance in criminal matters (hereinafter "treaty") which is similar to treaties signed with Switzerland, Turkey, the Netherlands, Colombia, Italy, Morocco, Canada, Thailand, the Bahamas, and Mexico[1] that modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases. This treaty represents a second major breakthrough in United States' efforts

[1]Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, signed at Bern May 25, 1971, 27 UST 2019, TIAS 8302 (entered into force Jan. 23, 1977)(hereinafter "U.S.-Swiss Treaty"); U.S.-Turkey Treaty on Extradition and Mutual Assistance in Criminal Matters, signed at Ankara June 7, 1979, 32 UST 311, TIAS 9891 (entered into force Jan. 1, 1981)("U.S.-Turkey Treaty"); U.S.-Netherlands Treaty on Mutual Assistance in Criminal Matters, signed at the Hague June 12, 1981, TIAS 10734 (entered into force Sept. 15, 1983)("U.S.-Netherlands Treaty"); U.S.-Colombia Mutual Legal Assistance Treaty, signed at Washington Aug. 20, 1980, ratification advised by the Senate Dec. 2, 1981 and instrument of ratification signed by the President Jan. 4, 1981 (not yet ratified by Colombia)("U.S.-Colombia Treaty"); U.S.-Italy Mutual Legal Assistance Treaty, signed at Rome Nov. 9, 1982, TIAS ____ (entered into force Nov. 13, 1985)("U.S.-Italy Treaty"); U.S.-Morocco Convention on Mutual Assistance in Criminal Matters, signed at Rabat October 10, 1983, ratification advised by the Senate June 28, 1984 and instrument of ratification signed by the President July 13, 1984 (not yet ratified by Morocco)("U.S.-Morocco Treaty"); U.S.-Canada Treaty on Mutual Assistance in Criminal Matters, signed at Quebec City March 19, 1985 ("U.S.-Canada Treaty"); and U.S.-Thailand Treaty on Mutual Assistance Treaty, signed at Bangkok March 19, 1986 ("U.S.-Thai Treaty"). See also U.S.-Bahamas Treaty on Mutual Assistance in Criminal Matters, signed at Nassau by the Bahamas on June 12, 1987, and by the United States on August 18, 1987; U.S.-Mexico Treaty on Cooperation for Mutual Legal Assistance, signed at Mexico City December 9, 1987; and U.S- Belgium Treaty on Mutual Legal Assistance in Criminal Matters, signed at Washington January 28, 1988. See, generally, Ellis and Pisani, United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 Int'l Lawyer 189 (1985).

to enlist the cooperation of Caribbean "bank secrecy" jurisdictions in the investigation and prosecution of transborder crime.[2]

A technical analysis of the treaty, prepared by the United States delegation which negotiated it, follows.

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[2] The first breakthrough was the conclusion of an executive agreement with United Kingdom and Cayman Island authorities on access to evidence needed in narcotics cases. "Exchange of Letters between the Government of the United Kingdom and the United States Concerning the Cayman Islands and Matters Connected With, Arising From, Related to, or Resulting From Any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961, signed at London July 26, 1984 (hereinafter the "Drug Information Agreement"). Section 7 of the Drug Information Agreement stated that if all parties were satisfied that the Agreement worked satisfactorily the negotiation of a full mutual legal assistance treaty would begin nine months after the Drug Information Agreement entered into force.

Article 1 – Obligation to Assist

The first article of the treaty, like those in other mutual assistance treaties, sets forth each party's obligation to provide assistance to the other in all matters involving the investigation, prosecution, and suppression of "criminal offenses," as that term is defined in detail in Article 19 of the treaty.[3]

The negotiators intended and agreed that the term "investigations" includes grand jury proceedings in the United States.

The term "suppression" was used to permit the treaty to be invoked in some instances in which no criminal investigation or prosecution is involved. For example, the treaty would apply to a civil forfeiture proceeding involving assets (e.g., profits) acquired by commission of a criminal offense covered by the treaty (e.g., illegal drug trafficking or racketeering).[4] Similarly, proceedings to disbar a lawyer convicted of knowingly participating in illegal narcotics trafficking might be administrative in nature, but would be clearly related to the criminal conduct and hence would qualify as a basis for a request under the treaty. Indeed, the paragraph specifically notes that "civil and administrative" proceedings relating to illegal drug trafficking are covered by the agreement.

The second paragraph of the article sets forth a nonexhaustive list of the major types of assistance specifically considered by the treaty negotiators. Most of the items listed in the second paragraph are described in further detail in subsequent articles.

The third paragraph provides that the treaty is intended solely for government to government mutual legal assistance. The treaty is not intended to provide to private persons a means of evidence gathering or securing other assistance in civil matters not involving the government or in criminal cases. Private litigants in the United States may continue to obtain evidence in the Cayman Islands by letters rogatory, an avenue of international assistance which this treaty leaves undisturbed. Similarly, the treaty is not intended to create any right in a private person to suppress or

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[3] A more detailed discussion of this point can be found at pages 29-31, below.

[4] Title 21, United States Code, § 881; Title 18, United States Code § 1964.

exclude evidence obtained thereunder. This provision is a standard provision in United States mutual legal assistance treaties.[5]

However, if an independent basis exists under domestic law for not executing the request, or for excluding the evidence in question, that basis may be invoked and the issue can be resolved in accordance with such law. This portion of the provision has limited applicability to the United Kingdom or the Cayman Islands, since the United States is the only party whose jurisprudence includes an exclusionary rule.

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[5] Ellis and Pisani, supra, note 1, at 211-212, 221-222. See also United States v. Johnpoll, 739 F. 2d 702 (2nd Cir. 1984).

Article 2 -- Central Authorities

Article 2 of the treaty requires that each party establish a "Central Authority" for transmission, reception, and handling of treaty requests. The Central Authority of the United States would make all requests to the Cayman Islands on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Cayman Islands' Central Authority will make all requests emanating from its officials. The Central Authority for the Requesting Party of course will exercise some discretion as to the form and contents of requests, and also to the number and priority of requests.

The Central Authority of the Requested Party is also responsible for receiving each request from the other, transmitting it to the appropriate federal or state agency, court, or other authority for execution, with a view to insuring that a timely response is made.

The second paragraph of the article provides that the Attorney General will be the Central Authority for the United States, as is the case under all other United States mutual legal assistance treaties. The Attorney General has delegated his duties as Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R. § 0.64-1.[6]

The "Cayman Mutual Legal Assistance Authority" is the designated Central Authority for the Cayman Islands. This is an entirely new entity, established under Cayman law specifically to carry out the Cayman Islands' responsibilities under the treaty. The Cayman Island law states that the Cayman Mutual Legal Assistance Authority shall be the Chief Justice of the Grand Court, acting alone and in an administrative capacity.[7]

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[6]The Assistant Attorney General for the Criminal Division has in turn redelegated his authority to the Deputy Assistant Attorneys General and to Director of the Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 81, 44 FR 18661, March 29 1979, as amended at 45 FR 6541, January 29, 1980; 48 FR 54595, Dec. 6, 1983.

[7] Section 4, Mutual Legal Assistance (United States of America) Law, 1986.

Article 3 --Limitations on Assistance

Article 3 specifies the classes of cases in which assistance may be denied under the treaty.

Article 3(1) excludes from the treaty any matter which relates directly or indirectly to the regulation of taxes, including the imposition, calculation, and collection of taxes. The Cayman Island authorities insisted upon this limitation because they firmly believed that it would be detrimental to the economic growth of the islands if they were thought to be assisting in the general enforcement of the United States' tax laws. The subparagraph specifically notes that exceptions to this restriction exist for matters falling within Article 19(3)(d), which deals with fraudulent promotion of tax shelters, and Article 19(3)(e), which deals with false statements to tax authorities in connection with illegally obtained income. A third exception is indicated by Article 19(3)(c) of the treaty: assistance is permitted in a tax case "arising from, related to, connected with, or resulting from" criminal narcotics matters. Thus, a civil or administrative tax proceeding involving the assets acquired through illegal drug trafficking could qualify as an offense under Article 19(3)(c) for which assistance could be provided under the treaty.

Article 3(1) also bars assistance if the investigation or case involves conduct not punishable by one year's imprisonment or more in order that the treaty facilitate international cooperation in serious criminal matters. As noted earlier, however, assistance can be available in some circumstances in connection with civil or administrative proceedings, so long as the proceeding is directly relevant to criminal conduct which falls within the treaty's terms.

Article 3(2) permits the Central Authority of either Party to deny assistance if the request does not conform to the treaty, e.g., such as where a request fails to contain all of the requisite information.

Article 3(2)(b) permits the Central Authority to deny a request if it relates to a political offense, or to a military crime not recognized by ordinary criminal law. These restrictions are similar to those found in other mutual legal assistance treaties. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition context for the application of these provisions.[8]

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[8]Thus, we would not expect the Central Authority of either party to deny a request as a "political offense" if it involves the kind of conduct listed in the Supplementary Treaty to the Extradition Treaty between the United States

Article 3(2)(c) permits the Central Authority of the Requested Party to turn down a request if it finds that the request fails to contain reasonable grounds to believe that a crime was committed, or that the information sought in the request is not relevant to that crime, or that the requested information is not in the territory of the Requested Party. The phrase "reasonable grounds to believe" is not the equivalent of a prima facie case, is certainly not intended to require either party to prove the guilt of the suspects beyond a reasonable doubt, and also is not the exact equivalent of the "probable cause" requirement in United States law for the issuance of a search or arrest warrant. Rather, the phrase was intended to require each Party to support its request with a precise, rational explanation for its belief that a crime covered by the treaty has occurred or will occur, and to set forth in detail the justification for seeking the evidence. This provision thereby insures the Requested Party that the request is not a "fishing expedition." Since many requests will be made at the investigative stage, it is unreasonable to oblige the Requesting Party to prove a prima facie case before the evidence has been assembled against the suspects.

It is anticipated that neither party will allow challenges to the credibility of statements in the request, nor demand that the Requesting Party supply "evidence" to support the request. Instead, the Central Authority of the Requested Party is given the discretion to reject a request if it is convinced that the information in the request (which is presumed to be true) fails to make out a case for the production of evidence.

All United States mutual legal assistance treaties allow the Requested Party to decline to execute a request if execution would prejudice the essential public interests of that Party. Article 3(3) of this treaty addresses the same issue by permitting the Central Authority of the Requested Party to deny a request where execution of the request would be contrary to the "public interest" of that Party. The United States delegation stated that the United States intends to interpret this provision sparingly, and views the "public interests" anticipated here as primarily those ancillary to national security. This would include cases where assistance would call for the disclosure of information which is classified for national security reasons. It is anticipated that the Attorney General will work closely with the Department of State, the Department of Defense, the Central Intelligence Agency, and any other relevant agency in determining whether or not to execute such a request.

The Cayman delegation noted that the Cayman Central Authority will refer to English common law jurisprudence on "public order" in interpreting

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and the United Kingdom, signed at Washington June 25, 1985, TIAS ____ (entered into force December 23, 1986),

the phrase, which could in its view include matters unrelated to national military security. However, it is clearly understood that "public interest" is not to be interpreted in any manner which would convert the treaty's mandatory provisions into discretionary ones, nor be woodenly invoked whenever bank secrecy is involved.

The subparagraph also requires that the Attorney General of a party certify that execution of a particular request would be contrary to the public interest before the request could be denied on this ground. This rule insures that decisions under this provision are made with careful consideration of the possible impact on overall relations between the parties.

Article 3(4) permits the Requested Party to impose appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Party might request information which could be used either in a routine criminal case (which would be within the scope of the treaty) or in a political prosecution (which could be refused under the treaty's terms). This paragraph would permit the Requested Party to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested Party would notify the Requesting Party of proposed conditions before actually delivering the evidence in question, thereby according the Requesting Party an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting Party does accept the evidence, it must respect the conditions specified by the Requested Party with respect to the evidence.

Article 4 -- Form and Contents of Request

This article is similar to Article 29 of the United States-Swiss Treaty, which, in turn, is based on Article 14 of the European Convention on Mutual Assistance in Criminal Matters.

The first paragraph requires that requests be in writing, and anticipates that the Central Authorities will agree between themselves on a standard format for such requests.

Article 4(2) lists information which is deemed crucial to the efficient operation of the treaty, and so must be included in each request. Article 4(3) outlines kinds of information which are important but not crucial, and should be provided " to the extent necessary and possible." In keeping with the intention of the parties that requests be as simple and straightforward as possible, there is no requirement under the treaty that a request be legalized or certified in any particular manner.[9]

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[9] Cf. Ellis and Pisani, supra note 1, at 203.

Article 5 -- Execution of Requests

The first paragraph of Article 5 obliges each Party promptly to undertake diligent efforts to execute a request. The treaty contemplates that the Central Authority of the Requested Party will first review the request and immediately notify the Central Authority of the Requesting Party if it is of the opinion that the request does not comply with the treaty's terms. If the request does satisfy the treaty's requirements and the assistance sought can be provided by the Central Authority itself, that Authority will comply with the request without delay. If the request meets the treaty's requirements but execution requires action by some other agency in the Requested Party, the Central Authority of that Party will see to it that the request is promptly transmitted to the correct agency for execution. One major problem with United States-Cayman relations in the past has been the length of time it has sometimes taken the Cayman authorities to respond to our requests for assistance, and it is hoped that this provision of the treaty will bring about expedited action.

Where the United States is the Requested Party, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution. However, a request may be transmitted to state officials for execution if the Central Authority deems it more appropriate to do so.

The second sentence of Article 5(1) authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to take whatever action would be necessary and within its power to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from the Cayman Islands. Rather, it is anticipated that when a request from the Cayman Islands requires compulsory process for execution, in most cases the Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, § 1782 and the provisions of this treaty. [10]

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[10] One United States court has interpreted Title 28, United States Code § 1782 as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1016 (2nd Cir. 1976); Fonseca v. Blumenthal, 620 F.2d 322 (2nd Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by

Article 5(2) states that where execution of the request entails action by a judicial or administrative agency, the Central Authority of the Requested Party shall arrange for the presentation of the request to that court or agency. Such actions shall not result in costs to the other Party. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation should be a significant advance in bilateral legal cooperation. It is understood that should the Requesting Party choose to hire private counsel in connection with a particular request, it is free to do so.

Article 5(3) is of critical importance. This paragraph provides that all requests shall be executed in accordance with the laws of the Requested Party except to the extent that the treaty specifically provides otherwise. Thus, neither party is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. Requests to the Cayman Islands for evidence needed in foreign countries are currently executed under two statutes, the Confidential Relationships (Preservation) (Amendment) Law, 1979,[11] and the Narcotic Drugs (Evidence) (United States of America) Law, 1984,[12] but the Caymans Islands has enacted a new law to carry out its obligations under this treaty.[13] For the United States, the treaty is intended to be self-executing, and no new or additional legislation apart from Title 28, United States Code, Section 1782, is needed to carry out the obligations undertaken.

The third paragraph of the article requires that procedures specified in the request shall be followed in the execution of the request so long as those

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administrative officials in the Requesting Party. The third sentence of Article 5(1) specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the treaty. Since the treaty permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Cayman Islands, this paragraph accords the courts slightly broader authority than § 1782, as interpreted in the India and Fonseca cases.

[11] Law 26 of 1979.

[12] Law 17 of 1984. This statute was enacted to implement the Drug Information Agreement.

[13] See note 7, supra.

procedures are not specifically prohibited by the law in the Requested Party. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Cayman Island authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given a fair opportunity to test its authenticity and trustworthiness.[14] Cayman law currently contains no similar provision. Similarly, United States courts frequently use procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, simply have not acquired widespread acceptance in the Cayman Islands yet.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened -- and the Requesting Party's investigation could be retarded -- if the Requested Party were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the treaty's primary goal of enhancing law enforcement in the Requesting Party could be frustrated if the Requested Party were to produce evidence in a manner which renders the evidence inadmissible or less useful in the Requesting Party. Therefore, Article 5(3) of the treaty requires the Requested Party to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested Party, the procedures of the Requested Party will be utilized.

The negotiators anticipated that in determining whether a particular procedure is "specifically prohibited" in the Requested Party, the authorities of that Party would be free to look to settled practice and case law as well as the provisions of statutory law. This is important because some of the procedural rules followed by Cayman Islands courts are matters of common law, and cannot conveniently be found in a single place such as the United States' Federal Rules of Criminal Procedure. The pivotal question in all cases will be whether the procedure the Requesting Party has specified is one

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[14] Title 18, United States Code, § 3505.

which is actually prohibited -- not simply unknown or rarely used -- in the Requested Party.

Article 5(4) states that a request for assistance need not be executed immediately where execution would interfere with an ongoing investigation or legal proceeding in the Requested Party. It is understood that the Central Authority of the Requested Party will determine when to apply this provision. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence which might otherwise be lost before the conclusion of the investigation or legal proceeding taking place in that Party. If this is done, the Requesting Party should not be seriously disadvantaged by having to wait until the conclusion of the proceedings.

Article 5(5) effectively requires that the Central Authority of the Requested Party promptly notify the Central Authority of the Requesting Party of the reason for denying or postponing execution of the request. This assures that when a request is only partly executed, the Requested Party will provide some explanation for not providing all of the information or evidence sought. This should eliminate misunderstandings which can arise in the operation of the agreement, and enable the Requesting Party to better prepare its requests in the future.

Article 6 - Costs

Article 6 of the treaty is largely self-explanatory, and proceeds from the basic principle that the Requesting Party should bear certain classes of expenses incurred in the execution of the request. The four classes of expenses are: the travel expenses of witnesses who agree to voluntarily appear in the Requesting Party; the fees of counsel or experts retained in connection with the execution of the request, but only if the Requesting Party's Central Authority approved of the retention; costs of stenographic reporting sought by the Requesting Party, unless the reports were prepared by the salaried employees of the Requested Party; and the reasonable costs of translators or interpreters needed for the execution of the request.

One novel item in the provision is Article 6(1), which obliges the Requesting Party to pay "reasonable costs of locating, reproducing, and transporting to the Central Authority of the Requesting Party documents or records specified in the request." This is the first mutual legal assistance treaty in which the United States has assumed such an obligation. The United States delegation made it clear that "reasonable" costs in connection with a request for bank or business records in the Cayman Islands should be the same or similar to the costs we pay with respect to subpoenas issued for similar evidence in the United States.[15]

The second paragraph of the article states that a witness who travels to the Requesting Party from the Requested Party pursuant to Article 10 of the treaty will be entitled to the same fees and allowances accorded to other witnesses in the the Requesting Party. When United States authorities serve a subpoena in the United States to obtain testimony from a person here, the recipient of the subpoena is ordinarily entitled to a modest stipend or witness

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[15] When the government seeks records from a banking institution in the United States, the Right to Financial Privacy Act may oblige the government to reimburse the institution for some of the costs of producing the records. Title 12, United States Code, § 3415. It does not seem unfair to extend similar reimbursement to Cayman Island institutions producing records pursuant to the treaty. However, expenses recoverable under the Right to Financial Privacy Act are limited to the costs of searching for, reproducing, and transporting documents to the requesting authority, and the amount which may be paid in each category is set out in the regulations implementing the Act. See 12 C.F.R. § 219.3. Of course, the witness/ institution has no right to reimbursement if it is itself the subject of the investigation. In Re Grand Jury Proceedings, 636 F. 2d 81 (5th Cir. 1981).

fee.[16] Accordingly, this article insures that witnesses who come to the United States from the Cayman Islands pursuant to this treaty will be treated the same as witnesses who appear from within the United States.

The third paragraph states that witnesses who appear or produce evidence in the Requested Party pursuant to a treaty request are entitled to such fees and allowances as agreed to by the Central Authorities. The provision gives the Central Authorities broad discretion to fashion reimbursement to insure that witnesses contacted under the treaty receive fair and just treatment in the matter of expenses. The negotiators agreed that the Central Authorities would not be be obliged to pay certain costs, including the costs of legal representation of institutional witnesses such as banks responding to requests under the treaty.[17]

However, where the witness is an individual who may himself be somehow involved in an investigation, the Requesting Party may wish to help with the costs of legal representation. The language of Article 6 thus makes it crystal clear that the Requesting Party does not bear any obligation to finance legal consultations in most cases, while leaving the flexibility for that

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[16] For example, under federal law a witness is currently entitled to $30 a day witness fee and up to $75 a day "subsistence." Title 28, United States Code, § 1821.

[17] When the United States seeks records from a bank or other institution in this country, the bank, like any other witness, is perfectly free to seek advice of legal counsel with respect to whether and how to respond. However, no witness has any constitutional or statutory right to call upon the United States Government to pay for such legal consultation. Indeed, the regulations implementing the Right to Financial Privacy Act specifically exclude reimbursement by the government of fees paid by a financial institution for "managerial or legal advice." 12 C.F.R. § 219.3. The United States delegation would not agree to any provision which would place Cayman Islands banks responding to requests under the treaty in a more favorable position than United States banks responding to a subpoena served here.

Moreover, it is anticipated that the Cayman Mutual Legal Assistance Authority will see to it that the bank is called upon to produce records in accordance with the legal procedures prescribed by Cayman Island law. Therefore, it would be strange indeed for the United States as Requesting Party to pay the institution for seeking legal advice on whether to comply with routine procedures called for by Cayman Island law.

counsel where it is especially just and appropriate.

In the past, the United States has encountered problems when asking individuals or institutions abroad to cooperate with one of our criminal investigations, particularly when the "bank secrecy" laws of the witness' country bar him from doing so unless certain steps are taken (such as obtaining the consent of the client or petitioning for the permission from the local courts). The United States simply does not have the legal authority to agree to pay all of the expenses which some witnesses desire in these matters,[18] although in a few individual cases we have been able to help the witness meet most of the costs of aiding the United States investigation. It is hoped that Article 6 of the treaty will provide a useful guide for constructively addressing these problems.

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[18] See, e.g., United States v. Johnpoll, 739 F. 2d 402 (2nd Cir. 1984).

Article 7 -- Limitations on Use

Article 4 of the treaty states that the Requesting Party must specify the reason why information or evidence sought under the treaty is needed. Accordingly, the first paragraph of Article 7 requires that information provided under the treaty will not be used for any purpose other than that stated in the request without the consent of the Central Authority of the Requested Party. It is understood by the Parties that notwithstanding any other provision of the treaty, the first paragraph of this article means in particular that such information or evidence shall not, without the prior consent of the Requested Party, be used for inquiries, examinations, audits, or to identify targets or seek other information or evidence which might be used in any inquiry, audit, or investigation, nor be introduced into evidence in the Requesting Party in any prosecution, civil litigation, administrative proceeding, or adjudication, except for the investigation or prosecution of the criminal offense for which the assistance has been granted against the target.

The second paragraph requires the Party which has obtained evidence to keep the evidence confidential. Under most United States mutual legal assistance treaties, conditions of confidentiality are imposed only when necessary, and are tailored to fit the circumstances of each particular case.[19] For instance, the Requested Party may wish to cooperate with the investigation in the Requesting Party but choose to limit access to information which might endanger the safety of an informant, or unduly prejudice the interests of persons not connected in any way with the matter being investigated in the Requesting Party. However, at the request of the Cayman and United Kingdom delegations, this treaty requires that all evidence provided in response to requests under its provisions be kept confidential unless otherwise agreed.

There is some question whether the Sixth Amendment to the United States Constitution would permit the United States to honor a confidentiality requirement imposed by the Cayman Islands on evidence which may be favorable to the accused.[20] Moreover, the purpose of the treaty is the production of evidence for use at trial, and that purpose would be frustrated if

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[19] U.S. -Netherlands Treaty Article 11(1); U.S. -Colombia Treaty Article 8(2); U.S. -Italy Treaty Article 8(1); U.S. -Morocco Treaty Article 7(1); U.S. -Canada Treaty Article 9(1); and U.S. -Thailand Treaty Article 7(3).

[20] See Brady v. Maryland, 373 U.S. 83 (1963).

the Requested Party can let the Requesting Party see valuable evidence but impose confidentiality restrictions which prevent the Requesting Party from using the evidence. Therefore, Article 7(2)'s obligation to keep information confidential contains an exception permitting use of the information to the extent that it is needed for investigations or proceedings forming part of the prosecution of the criminal offense described in the request.

It is anticipated that some United States requests for assistance may contain information which under our law must be kept confidential. For example, it may be necessary to set out information which is ordinarily protected by Rule 6e, Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation or proceeding," as required by Article 4(2)(b). Article 7(3) of the treaty enables the Requesting Party to call upon the Requested Party to keep the information in the request confidential.[21] If the Requested Party cannot execute the request without disclosing the information in question (as may be the case if execution requires a public judicial proceeding in the Requested Party), or for some reason this confidentiality cannot be assured, the treaty obliges the Requested Party to so indicate, thereby giving the Requesting Party an opportunity to withdraw the request rather than risk jeopardizing its investigation or proceeding by disclosure of the information.

Once evidence obtained under the treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain. The information is likely to become a matter of common knowledge, perhaps even cited or described in the press. When that occurs, it is practically impossible for the Central Authority of the Requesting Party to carry out an obligation like the one imposed in Article 7(1) by blocking the use of that information by third parties or other government agencies. Therefore, some United States mutual legal assistance treaties permit evidence obtained under the treaty to be used for any purpose after it has become public in a trial resulting from the proceedings described in the request.[22]

The negotiators of this treaty recognized this phenomenon, but Cayman Island officials insisted that public revelation of information obtained under the treaty should not justify, in and of itself, the Requesting Party's use of the information for purposes inconsistent with Article 7(1). Therefore, Article 7(4) of the treaty states that once evidence obtained under

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[21] It is thus similar to Article 8(2) of the U.S. -Italy Treaty and Article 7(2) of the U.S.- Thailand Treaty.

[22] See Article 11(3) of the U.S. -Canada Treaty.

the treaty has been made public in a proceeding forming part of the request, the evidence may be used if one of three exceptions applies.

First, under Article 7(4)(a), the evidence can be used for any purpose against persons who were convicted in a criminal trial for an offense covered by the treaty. For example, if evidence is provided under the treaty in connection with a criminal trial for securities fraud, and the defendant is convicted of the offense, the evidence could be used by other governmental authorities -- including tax authorities -- against the convicted person for any purpose, including assessing and collecting taxes due on the fraudulently obtained funds.

Second, Article 7(4)(b) states that the evidence can be used without restriction for any criminal prosecution of a person for offenses falling within the treaty. This paragraph applies regardless of whether the Requesting Party secured a conviction of the person who was the defendant in the case upon which the initial request was based. For instance, if evidence is provided under the treaty for use in a criminal trial of Mr. A on securities fraud charges, and the evidence reveals that Mr. B also participated in the crime, the evidence may be freely used to prosecute Mr. B even if Mr. A is acquitted at trial. Similarly, if evidence were obtained in connection with one treaty offense (such as fraud), and the evidence discloses the commission of another treaty offense (such as a murder), the evidence could be used by the Requesting Party in a prosecution for that second treaty offense without violating this article, even if no conviction was obtained for the crime on which the initial request was based.

Finally, Article 7(4)(c) authorizes the use of the evidence in civil or administrative proceedings related to the recovery of the unlawful proceeds of a criminal offense covered by the treaty, from a person who has knowingly received them. The evidence may also be used in forfeiture to the government of the unlawful proceeds or instrumentalities of a criminal offense, or in collecting tax or enforcing tax penalties resulting from knowingly receiving the proceeds of a criminal offense covered by the treaty. This is consistent with Article 16(2) of the treaty, which obliges the parties to assist one another in the forfeiture of criminally obtained assets, in securing restitution to the victims of crimes, and in the enforcement of sentences involving fines.

It should be kept in mind that under Article 1(3) of the treaty, the restrictions in Article 7 are for the benefit of the parties to the treaty -- the United States and Cayman Islands governments -- and the enforcement of these provisions is left entirely to the parties. Where any individual alleges that an authority in the United States is seeking to use information or evidence obtained from the Cayman Islands in a manner inconsistent with this article, the recourse would be for the person to inform the Central Authority of the Cayman Islands of the allegations, for consideration only as matter between the governments. If either of the parties believe that the allegations require explanation, it may make an appropriate inquiry.

Article 8 – Taking Testimony and Producing Evidence in the Territory of the Requested Party

Paragraph 1 of Article 8 states that the Requested Party shall compel a person within its jurisdiction to testify or produce documents or articles needed as evidence in the Requesting Party. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of that party.

Both delegations agreed that Article 8(1), read together with Article 5(3), insures that no person would be compelled to furnish information if he has a right not to do so under the law of the Requested Party. Thus, a witness questioned in the United States pursuant to a treaty request from the Cayman Islands is guaranteed the right to invoke any of the testimonial privileges (such as attorney client privilege, interspousal privilege, etc.) usually available in proceedings here, as well as the constitutional privilege against self-incrimination.[23] Of course, a witness testifying in the Cayman Islands may raise any of the similar privileges available under Cayman Island law.

Since the law is unclear on the extent to which a person in one country may stand on a privilege available only under the law of a foreign country, the treaty neither requires nor forbids the recognition in the Requested Party of privileges existing only in the law of the Requesting Party. However, Article 8(2) does require that in cases in which a witness attempts to assert a privilege unique to the Requesting Party, the authorities in the Requested Party will take the desired evidence and turn it over to the Requesting Party along with notice that it was obtained over a claim of privilege. The applicability of the privilege can then be determined in the Requesting Party, where the scope of the privilege is best understood.[24] A similar provision appears in many of our recent mutual legal assistance treaties.[25]

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[23] This is consistent with the approach taken in Title 28, United States Code, § 1782.

[24] Cf. R. & I. Dick Co. v. Bass, 295 F.Supp. 758 (N.D. Ga. 1966); Reg. v. Rathbone, Ex p. Dikko [1985] 2 W.L.R. 375.

[25] U.S.-Netherlands Treaty Article 5(1); U.S.-Colombia Treaty Article 9(1); U.S.-Italy Treaty Article 14(6); U.S.-Morocco Treaty Article 8(2); U.S.-Thailand Treaty Article 8(2).

The third and fourth paragraphs provide that any interested parties, including the defendant and his counsel in criminal cases, may be permitted to be present and pose questions during the taking of testimony under this article.

Article 8(5) states that records produced pursuant to the treaty may be authenticated by having a custodian of the records or other qualified person complete, under oath, a certification in a specified form. A model of the form is appended to this treaty. Thus, the provision establishes a procedure for authenticating foreign records in a manner essentially similar to that followed in Title 18, United States Code, § 3505.[26]

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[26]It is understood that the last sentence of the article provides for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 9 -- Providing Records of Government Agencies

Article 9 of the treaty serves to insure speedy access to government records and other forms of documentary information in the Cayman Islands. It is anticipated that the kinds of government information which will be most commonly sought will include records from the Registrar of Companies, the records of convictions in Cayman Island courts, or documents from the files of the police or other investigative authorities. It also is expected that Cayman Island requests for government documents in the United States will generally fall in the same categories.

The first paragraph obliges each party to furnish to the other copies of publicly available records of a government department or agency in its territory. The term "government department or agency" includes executive, judicial, and legislative units at the federal, state, and local level.

The second paragraph provides that the Requested Party "may" share with its treaty partner copies of nonpublic information in government files. This provision is discretionary. Moreover, the article states that the Requested Party may only utilize its discretion to turn over information in its files "to the same extent and under the same conditions" as it would to its own law enforcement or judicial authorities. It is the intention of the negotiators that the Central Authority of the Requested Party determine what that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each party contain some kinds of information which would be available to investigative authorities in that party, but which justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be denied under this provision where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information which was given to the Requested Party in return for a promise that it not be divulged to anyone. Of course, a request could be denied under this provision if the disclosure of the information is barred by the law in the Requested Party.

The third paragraph of Article 9 states that documents provided under this article will be authenticated pursuant to a certificate in a form appended to the treaty. Thus, the treaty establishes a procedure for authenticating foreign official records by certificate, in a manner essentially similar to Rule 902(3), Federal Rules of Evidence, and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

This article speaks in terms of the Requested Party providing copies of government records, but the negotiators agreed that the Requested Party would not be precluded from delivering the original of the records, upon request, if the law in the Requested Party permits it and where it is essential to do so.

Article 10 – Appearance in the Territory of the Requesting Party

Article 10 provides that upon request the Requested Party shall invite witnesses who are located in its territory and needed in the Requesting Party to travel to the Requesting Party to testify. An appearance in the Requesting Party under this article is not mandatory, and the invitation may be refused by the prospective witness.

Of course, the Requesting Party would be expected to pay the expenses of such an appearance, and Article 4(3)(g) of the treaty provides that the witness shall be informed of the amount and kind of allowances and expenses which the Requesting Party will provide in a particular case.

Paragraph 2 of this article, like Article 27 of the U.S.-Swiss Treaty, provides that a person who is in the Requesting Party under the treaty shall not be subject to service of process in any civil suit, nor shall he be arrested, detained, or subject to any restriction on his personal liberty. This "safe conduct" is limited to protection from liability for acts or convictions which preceded the witness' departure from the Requested Party to testify in the Requesting Party. It is understood that this provision does not, of course, prevent the prosecution of a person for perjury or any other crime committed while in the Requesting Party.

The applicability of this article's "safe conduct" paragraph with respect to a person transferred under Article 11 is necessarily limited, since Article 11 requires that the witness be kept in custody unless the Party from which he was transferred consents to his release.

The third paragraph states that the safe conduct guaranteed in this article expires ten days after the person has been notified in writing by the appropriate authorities that his presence is no longer required, or if he leaves the Requesting Party and thereafter returns to it.

Article 11 - Transferring Persons in Custody for Testimonial Purposes

In some recent criminal cases, a need has arisen for the testimony at a trial in one country of a witness serving a sentence in another country. In some instances, the country involved was willing and able to "lend" the witness to the United States Government, provided the witness would be carefully guarded while here and returned at the conclusion of his testimony. In one or two situations, the Justice Department has been able to arrange for federal inmates here to be transported to foreign countries to assist in criminal proceedings there.[27] Both delegations anticipate that similar situations might arise between the United States and the Cayman Islands, and Article 11 therefore provides an express legal basis for cooperation in these matters. The provision is based on Article 26 of the U.S.-Swiss Treaty, which is in turn based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.

There have also been recent situations in which a person in custody in the United States in a criminal matter has demanded permission to travel to another country to be present at a deposition being taken there in connection with the case.[28] The second paragraph of the article addresses this situation.

The article's third paragraph provides express authority for the receiving Party to maintain the person in custody throughout his stay there, unless the other Party specifically authorizes release. The paragraph also authorizes the receiving Party to return the person in custody to the other Party, and provides that this return will occur as soon as circumstances permit, or as otherwise agreed, but in no event later than the date on which the person would expect to be released from custody in the Party from which he was transferred. The transfer of a prisoner under this article requires the consent of the person involved and of the Parties, but the provision does not

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[27] For example, on September 13, 1986, the Justice Department and the Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in the case of Regina v. Dye, Williamson, Ellis, Davies, Murphy, and Millard, a major narcotics case in Central Criminal Court -- "the Old Bailey" -- in London.

[28] See United States v. King, 552 F. 2d 833 (9th Cir. 1976), where the defendants insisted on travelling to Japan to be present at the deposition of certain witnesses in prison there.

require the prisoner to consent again to his return to the Party where the transfer began.

Once the receiving Party has agreed to assist the sending Party's investigation or proceeding pursuant to this article, it would be inappropriate for the receiving Party to hold the person transferred and require full-dress extradition proceedings before allowing him to return to the sending Party as agreed. Therefore, the paragraph contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred.

Article 12 -- Location of Persons

Article 12 provides for ascertaining the whereabouts in the Requested Party of persons (such as witnesses, potential defendants, or experts) where such information is of importance in connection with an investigation or proceeding covered by the treaty. This is a standard provision contained in all of our mutual legal assistance treaties.

Both delegations clearly understood that the obligation to locate persons is limited to persons who are or may be in the territory of the Requested Party. Thus, the United States would not be obliged to try and locate United States citizens or others who may be in third countries. In all cases, the Requesting Party would be expected to supply such information as may be available about the last known location of the person sought.

Article 13 – Service of Documents

Article 13 creates an obligation on the part of the Central Authority of the Requested Party to arrange for or effect the service of summons, complaints, subpoenas, or other legal documents at the request of the Central Authority of the other Party.

It is expected that when the United States is the Requested Party, service under the treaty will be made by registered mail (in the absence of any request by the Cayman Islands to follow any specified procedure for service) and by the United States Marshal's Service in instances where personal service is requested.

It was hoped by the United States delegation that this article would facilitate service of subpoenas on United States citizens in the Cayman Islands, pursuant to Title 28, United States Code § 1783. However, the Cayman authorities insisted that the first paragraph of the article be worded so as not to obligate the Requested Party to serve any subpoena which requires the attendance of a person in the Requested Party at a proceeding before an authority or tribunal in the Requesting Party. The Requested Party is free to agree to serve such process if it chooses to do so as a matter of discretion, but it may also decline the request.

The article states that where the document to be served calls for the appearance of a person in the Requesting Party the document must be transmitted by the Requesting Party to the Requested Party a reasonable time before the scheduled appearance. Thus, if the United States were to ask the Cayman Islands to serve a subpoena issued pursuant to Title 28, United States Code, § 1783 on a United States citizen in the Cayman Islands, the request would have to be submitted well in advance of the hearing or trial at which the respondent is expected to appear. This is to allow sufficient time for service to be effected and for the respondent to make arrangements for his appearance. It is anticipated that the Central Authorities will agree between themselves upon guidelines for the smooth implementation of this provision.

Article 14 -- Search and Seizure

It is sometimes in the interests of justice for one State to ask another to search for, secure, and deliver articles or objects needed in the former as evidence or for other purposes. United States courts can and do execute such requests now under Title 28, United States Code, § 1782, [29] and the Cayman Islands delegation felt that such requests could be carried out under current Cayman Islands law if made by letters rogatory. Article 14 of the treaty creates a formal framework for handling such a request.

The article requires that the search and seizure request include "information justifying such action under the laws of the Requested Party." This means that normally a request to the United States from the Cayman Islands will have to be supported by probable cause for the search. A United States request to the Cayman Islands would have to satisfy the corresponding evidentiary standard there. It is contemplated that the request would be carried out in strict accordance with the law of the country in which the search is being conducted.

The second paragraph of the article is designed to insure that a record is kept of articles seized and of articles delivered up under the treaty. This provision effectively requires that the Requested Party keep detailed and reliable information regarding the condition of the article at the time of seizure, and the chain of custody between seizure and delivery to the Requesting Party.

The article also requires that the certificates will be admissible without additional authentication at trial in the Requesting Party. This is important because it was intended to spare the Requested Party the burden, expense, and inconvenience of having to send its law enforcement officers to the Requesting Party to provide authentication and chain of custody testimony each time evidence produced pursuant to this article is used. The injunction that the certificates be admissible without additional authentication at trial leaves the trier of fact free to bar use of the evidence in spite of the certificate if there is some other reason to do so aside from authenticity.

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[29] See e.g., United States Ex Rel Public Prosecutor of Rotterdam, Netherlands v. Richard Jean Van Aalst, Case No 84-67-Misc-018 (M. D. Fla, Orlando Div.) cited in Ellis and Pisani, supra note 1, at 215.

The final paragraph of the article states that the Requested Party need not surrender any articles it has seized unless it is satisfied that any interests third parties may have in the seized items are adequately protected. This permits the Requested Party to insist (for instance) that the Requesting Party promise that the article will be returned to the Requested Party at the conclusion of the proceeding in connection with which it is needed. This article is similar to provisions in many United States extradition treaties, including the recent treaties with the United Kingdom, Canada, Japan, and Mexico.[30]

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[30] Article 13, United States-United Kingdom Extradition Treaty, signed at London June 8, 1972, 28 UST 227, TIAS 8468 (entered into force Jan. 21, 1977); Article 15, United States-Canada Extradition Treaty, signed at Washington Dec. 3, 1971, 27 UST 983, TIAS 8237 (entered into force March 22, 1976); Article 13, United States-Japan Extradition Treaty, signed at Tokyo March 3, 1978, 31 UST 892, TIAS 9625 (entered into force March 26, 1980); Article 19, United States-Mexico Extradition Treaty, signed at Mexico City May 4, 1978, 31 UST 5059, TIAS 9656 (entered into force Jan. 25, 1980).

Article 15 – Return of Documents and Articles

This procedural article provides that any documents or articles of evidence furnished under the treaty must be returned to the Requested Party as soon as possible unless that Party waives their return. This means that documents or items provided to the United States pursuant to a treaty request must be returned to the Cayman Islands once they are no longer needed here, unless the authorities in the Cayman Islands waive their return. It is anticipated that unless original records or articles of some intrinsic value are provided, the Requested Party will routinely waive return, but this is a matter best left to development of practice.

Article 16 -- Proceeds of Crime

A major goal of the treaty is to enhance the efforts of both the United States and the United Kingdom in the war against narcotics trafficking. One significant strategy in that war is reflected in the efforts by United States authorities to seize and confiscate the money, property, and other proceeds of drug trafficking.

Article 16 is similar to Article 17 in the U.S.-Canada Treaty and Article 15 of the U.S.-Thailand Treaty. The first paragraph authorizes the Central Authority of one Party to notify the other of the existence in the latter's territory of proceeds of a serious offense such as drug trafficking. The term "proceeds" was intended to include things such as money, vessels, or other valuables which are either being used in the crime or which were purchased or obtained as a result of the offense.

Upon receipt of notice under this article, the Central Authority of the Party in which the proceeds are located may take whate er action is appropriate under the law in that Party. For instance, the assets in question are located in the United States and were obtained as a result of a fraud in the Cayman Islands, they could be seized in aid of a prosecution under Title 18, United States Code, § 2314,[31] or be made subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. If the assets are located in the Cayman Islands, we expect similar action could be taken pursuant to Cayman law.[32]

If the assets in question are the fruit of drug trafficking, Article 16 contemplates that the Contracting Parties will be especially willing to help one another. Recently enacted legislation in the United States expands the authority of law enforcement officials to seize the proceeds of drug trafficking. A portion of the new law -- Title 18, United States Code, Section 981(a)(1)(B) -- also allows the forfeiture to the United States of property "which represents

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[31]This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud here or abroad.

[32]We understand that under some circumstances English common law currently permits this to be done. See Mareva Compania Naviera SA v. International Bulkcarriers SA, [1980] All ER 213; Bankers Trust Co. v. Shapira, [1980] 1 W.L.R. 1274.

the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada, and there is a growing trend among nations toward legislation of this kind in the battle against narcotics trafficking.[33] The United States delegation expects that Article 16 of the treaty will make full use of the new legislation.

The second paragraph of Article 16 states that the parties to this treaty may aid one another in proceedings leading to the forfeiture of the proceeds of crime. The traditional rule was tha no state is obliged to aid anothr in the execution of penal laws respecting enforcement of fines or forfeiture of criminal assets. However, this rule is gradually changing, at least where the foreign country's laws are designed to provide redress to individual victims, or where the foreign country has already perfected its title to the assets it claims.[34] Moreover, any country is always free to assume by treaty a broader obligation than may be generally recognized under customary international law. In the second paragraph of Article 16, the parties to this treaty assume an obligation to aid one another, on request, in proceedings leading to the forfeiture of illegally obtained assets, restoring illegally obtained funds or articles to their rightful owners, and the collection of fines imposed as sentences in criminal prosecutions.

Thus, if the law of the Requested Party enables it to seize assets in aid of a proceeding in the Requesting Party or enforce a judgement of forfeiture or fine levied in the Requesting Party, the treaty encourages the Requested Party

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[33] See, e.g., the analysis and text of Article 3 of the United Nations Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which calls for the signatory nations to enact broad legislation to forfeit illicit drug proceeds and to assist one another in such matters, as set out in A Report on the Status of the Draft, the U.S. Negotiating Position, and Issues for the Senate, S. Prt. No. 100-64, 100th Cong., 1st Sess., 6-11, 25-26 (1987).

[34] See, e.g., Mutual Assistance in Criminal Matters: A Commonwealth Perspective, prepared by Dr. David Chaikin and Commonwealth Secretariat for the meeting of Commonwealth Law Ministers, Sri Lanka, February 14-18, 1985, at pages 32-34.

to do so. The language of the article is carefully selected, however, so as not to require either Party to take any action which would go beyond "the extent permitted by [its] laws." It therefore does not mandate institution of forfeiture proceedings in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.

The new United States law permits the Government to transfer an equitable share of certain forfeited property to other countries pursuant to a treaty. Under regulations promulgated by the Attorney General, this equitable share will generally reflect the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The new law requires that these provisions operate only "to the extent provided for by Treaty" and pursuant to "treaties providing for the transfer of forfeited properties to the foreign country," so the negotiators drafted Article 16 broadly to ensure that it would authorize and provide for such transfers. Thus, Article 16 will enable either party to transfer forfeited assets, or the proceeds of the sale of such assets, to the other party to the extent permitted by their respective laws. It is anticipated that the terms of such transfers will be agreed upon through an exchange of diplomatic notes.

Article 17 – Exclusivity

Most mutual legal assistance treaties were negotiated to supplement the various channels of international cooperation available to each party, not to replace those channels. Therefore, these agreements typically provide that the treaty shall not prevent recourse to any assistance available under the internal laws of the parties. In other words, there is usually no requirement that the parties to a mutual legal assistance treaty use the treaty to the exclusion of other lawful means.

However, some methods of evidence gathering permitted under United States internal law have the practical result of evidence being collected in the Cayman Islands and being turned over to United States authorities without the permission of the Cayman Islands authorities, and are hence viewed by the Cayman Islands and the United Kingdom as impermissible intrusions into their sovereignty. They insisted that the mutual legal assistance treaty contain at least the same kind of restriction on United States extraterritorial evidence gathering that the Drug Information Agreement contains. Article 17 was intended to address this concern.

The first paragraph is standard to mutual legal assistance treaties, and confirms that assistance and procedures available under this treaty shall not prevent or restrict assistance available under any other international agreement or arrangement which may be applicable.[35] This is intended to leave in place any bilateral and multilateral arrangement for cooperation, such as Interpol.[36] Should the parties decide to keep the Drug Information Agreement in force, this provision of the treaty will allow the Agreement to operate smoothly in conjunction with the treaty.

The second paragraph is new, and is based on Articles 3 and 4 of the U.S.-Canada treaty. It provides that a party which needs assistance in a case

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[35] Ellis and Pisani, supra note 1, at 210; Article 16, U.S.-Morocco Treaty; Article 21, U.S.-Colombia Treaty.

[36] Also, various agencies (such as the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Customs Service) have established working liaison with their counterparts in the Royal Cayman Islands Police Force. These channels of communication are valuable ones for law enforcement purposes, and it was not the intention of the mutual legal assistance treaty negotiators to alter or disturb them.

covered by the treaty must make a request for that assistance pursuant to the treaty unless some other international agreement or arrangement applies. The negotiators agreed that each party will decide for itself whether it needs assistance under the treaty. For example, if United States law enforcement officials wish to use certain evidence at a trial here, and identical copies of that evidence can be found both in the United States and in the Cayman Islands, the United States would not be a party "needing" assistance under the terms of this paragraph, and efforts to acquire the evidence from within our territory are permissible.

The third paragraph is highly significant. It provides that in general neither party shall enforce any compulsory measure for the production of documents located in the territory of the other in connection with a case which falls within the treaty. The term "compulsory measure" specifically includes grand jury subpoenas, and was intended to capture either grand jury or trial subpoenas commanding the United States branches of international banks or businesses to produce records from the Cayman Islands. See, e.g., In Re Bank of Nova Scotia, 740 F. 2d 817 (11th Cir 1984). The parties agreed that the term also includes court orders to a person commanding that he sign a waiver of foreign bank secrecy or direct his bank abroad to turn over records to United States authorities. See, e.g., United States v Ghidoni, 732 F.2d 814 (11th Cir. 1984); United States v Davis, 767 F. 2d 1131 (2d Cir. 1985). Thus, this paragraph of the treaty is somewhat broader in scope than the cognate provision of the Drug Information Agreement.[37]

Sometimes United States courts issue subpoenas or material witness warrants for persons (including Cayman residents) who might be temporarily in the United States, thereby obliging the witness to disclose information arguably covered by Cayman secrecy laws. United States v Field, 532 F. 2d 404 (11th Cir. 1985). The Cayman Island delegation urged that the language be drafted to bar enforcement of such process, but the United States delegation

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[37] Paragraph 6 of that Agreement states:

> No Federal subpoena (including a grand jury subpoena) related to documentary information located in Cayman in any matter falling within paragraph 2.1 of this Agreement will be enforced in the United States without the prior agreement of either the United Kingdom Government or the Cayman Government.

This provision does not apply to process issued by state or local courts, and does not reach court ordered waivers under the Ghidoni procedure.

refused, viewing this as an undesirably broad restriction on each party's sovereign power to deal with persons who are physically on its soil. Article 17 also does not cover administrative summonses served by agencies such as the Internal Revenue Service, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, unless the matter under investigation by those agencies falls within the definition of "criminal offense" in the treaty.

The final paragraph details the procedure to be followed by a party wishing to free itself from the obligations of the third paragraph. It provides that a party's obligation to refrain from using unilateral compulsory measures is dissolved only after the party (1) gives notice to the other that delay or denial of the request would jeopardize the investigation or proceeding and (2) further gives at least forty-five days' notice in writing that it deems its obligations under the treaty fulfilled. This gives the authorities in each party time to consult with each other directly pursuant to Article 18(1) or through diplomatic channels, as envisaged in Article 18(2). The paragraph makes it clear that in no case may a party's obligations under the article be deemed fulfilled sooner than ninety days after the receipt of the request. The basic thrust of the paragraph is to insure that when the United States seeks records which are in the Cayman Islands in a case covered by the treaty, it will use the treaty as the avenue of first resort, and will not utilize unilateral compulsory measures unless it has first notified the Cayman authorities of the problem, sought their aid in the production of the records pursuant to Cayman law, accorded them a reasonable period of time for their response, then waited a further period to permit such diplomatic consultations as the parties deem appropriate.

Article 18 – Consultations

The conclusion of this agreement is rather more than the simple signing of a treaty. It is the beginning of a new, better, and more cooperative relationship between the law enforcement communities in the United States and the Cayman Islands. It is also the establishment of a framework within which the investigator and prosecutors of the parties can work together more effectively. Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective, and to improve the efficiency of their own efforts. The first paragraph of the article calls upon the parties to share those ideas with one another, with a view to achieving the most effective possible implementation of the treaty. The first paragraph of the article also encourages both parties to share in a timely manner information about the utilization of evidence obtained under the treaty. This should enable all interested parties to improve the utilization of the treaty. A very similar provision is found in Articles 3 and 18 of the U.S.- Canada Treaty.

The negotiators realized that occasionally there will be differences of opinion which the law enforcement authorities who implement the treaty will be unable to resolve despite the best of intentions. The second paragraph of Article 18 specifically recognizes that in such cases either side may seek the assistance of the diplomatic and political authorities to resolve the difficulty.

Article 19 – Definitions

This article contains the definition of three terms used throughout the treaty.

Article 19(1) defines "Contracting Parties" as the Governments of the United States and the United Kingdom, and Article 19(2) defines "the Parties" as the Governments of the United States and the Cayman Islands. While the Cayman Islands Government participated in the negotiations, signed the treaty, and has obligations under this treaty, it is a dependent territory of the United Kingdom, and hence it lacks the authority under international law to contract a treaty in its own right. Therefore, the United States concluded the treaty with the United Kingdom on behalf of the Cayman Islands.

Article 19(3) provides that for the purposes of this treaty, "criminal offenses" means: (1) any activity punishable by more than one year's imprisonment under the law of both the Requesting and Requested Parties;[38] (2) any matter (whether punishable in both countries or not) which constitutes racketeering,[39] drug trafficking,[40] fraud in connection with tax shelters,[41] tax evasion or filing false statements with respect to illegally

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[38] Article 19(2) of the treaty defines "the Parties" as the United States and the Cayman Islands. Of course, the Cayman Islands employs British law, so in most respects one could look to ordinary British criminal law to determine if this portion of the test is satisfied. A criminal violation of the law of a state would be an offense against the law of the United States for purposes of this provision.

[39] The detailed definition is based on Title 18, United States Code, Sections 1961-1968.

[40] Drug trafficking is defined as any matter "connected with, arising from, related to, or resulting from" certain internationally recognized drug offenses, and it is the intention of the parties that the phrase have at least as broad a meaning in this treaty as it has in the Drug Information Agreement. It should be noted that the definition here is slightly broader than in the Drug Information Agreement, for the Agreement covers any offense referred to in the Single Convention on Narcotic Drugs, or the Amending Protocol to the Single Convention, while the treaty covers crimes in "any other international agreement or arrangement binding upon both the parties" as well. This is significant because the United Kingdom has now, like the United States become a party to the Convention on Psychotropic Substances, done at

obtained income,[42] failing to report transfers of illegally acquired money,[43] insider trading in securities,[44] fraudulent securities practices, violations of the Foreign Corrupt Practices Act,[45] or participation in any of these crimes; or (3) "such further offenses as may from time to time be agreed upon by exchange of diplomatic notes." The term "criminal offense" does not include any matter directly or indirectly related to the imposition, calculation, or collection of taxes unless the case can be fairly described as falling within Articles 19(d) and 19(e), which deal with fraud in connection with tax shelters, and tax evasion or filing false statements with respect to illegally obtained income, respectively.

Vienna February 21, 1971, 32 UST 543, TIAS 9725, 1019 UNTS 175 (entered into force for the United States July 15, 1980). Other international agreements may come into force in the future, and the scope of offenses covered by the treaty has the flexibility to grow as the international regulation of illegal narcotics trafficking grows.

[41] It is not necessary under this provision that fraud charges have been filed against the offender.

[42] This of course includes filing false tax returns, false statements, or failing to report or pay tax on money acquired through drug trafficking. This provision does not apply if the only offense which can be tied to the income is failure to file required reports in respect of its transfer.

[43] See, e.g., 31 United States Code, § 5317(b). Note that this applies only if the money which was transported without the proper report being filed is itself related to the proceeds of a criminal offense covered by the treaty. Moreover, the criminal offense to which the proceeds relate cannot be failing to file currency reports, or making false statements to tax authorities in connection with unlawfully acquired money.

[44] The parties agreed that for purposes of this treaty the term "securities" here includes commodities futures.

[45] 15 United States Code, § 78 (Supp.. II 1978).

Article 20 -- Ratification, Entry into Force, and Termination

The final article contains standard language concerning the procedure for ratification, exchange of the instruments of ratification, and the entry into force of the treaty.

The final paragraph of this article contains a standard provision concerning the procedure for terminating the treaty. The requirement that a Party give three months' notice of an intent to terminate the treaty is not unusual in a mutual legal assistance treaty, and is similar to the requirement contained in our treaties with other countries.

Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate give its advise and consent to ratification of the Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters, with protocol, signed at Grand Cayman, Cayman Islands on July 3, 1986, together with related notes exchanged at London the same day.

ADDITIONAL VIEWS ON SENATOR JESSE HELMS

During consideration of the Genocide Convenion in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to this Treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This Treaty seeks to enhance national and international law inforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The Treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seek to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the United States Constitution.

Other countries could demand evidence from the U.S. that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So the question is this: Will this Treaty unintentionally result in an infringement upon the Constitutional rights and freedoms of American citizens.

As these treaties are currently drafted, we can be certain there will be a full scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—strongly opposed enactment of these treaties "as is" in hearings of the Senate Foreign Relations Committee.

Mr. Chairman, there is a dispute among scholars as to whether or not the Constitution of the United States supersedes treaties in all instances. Nor have the courts settled this issue. The State Department has cited *Reid* v. *Covert,* 354 U.S. 1 (1956), as standing for the proposition that the Constitution always prevails where a case concerns matters both within the territorial boundaries of the United States or in foreign lands.

Yet, such an interpretation misreads the *Reid* v. *Covert* holding. This case holds only that executive agreements consummated by the President without advice and consent of the Senate must conform to the Constitution in all circumstances. Treaties, however, are not executive agreements; indeed treaties are another matter.

As the distinguished justice and legal scholar, John Marshall Harlan III, wrote in his concurring opinion in *Reid* v. *Covert,* "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to Amer-

ican citizens in every part of the world * * * The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place." (Harlan, J., concurring, at 74).

Furthermore, in *Missouri* v. *Holland*, 252 U.S. 416 (1920), Justice Holmes suggested that there is no substantive limit to the treaty-making power. In *Ware* v. *Hylton*, 3 Dall. 199, 284 (1976) Justice Cushing wrote that the "Treaty * * * is of equal force with the Constitution.

I wish it were the case that the Supreme Court had conclusively determined that the Constitution is supreme in all cases. But since this determination has not been made, a reservation is necessary to assure that Constitutional rights of Americans are not abridged by the execution of these treaties.

For those who hold the view that the Supreme Court has held that the Constitution supersedes a treaty, then these reservations merely confirm their beliefs. However, if that view is wrong; these reservations will save the day.

In addition, under Article 27 of the Vienna Convention on the Law of Treaties—which the State Department perceives as customary international law—no state may "invoke the provisions of its internal law as justification for failure to perform a treaty." So even if we all agree that the Constitution—our fundamental internal law—takes precedence, international law seems to be pointing in the other direction.

Indeed, this possibility that the United States might be found in default of international obligations was a major factor in the Committee's approval of the Constitutional Reservation to the Genocide Convention.

As the Committee Report on the Genocide Convention stated:

> (t)he problem is that international law does not recognize the Constitution as supreme.
>
> Article 27 of the Vienna Convention on the Law of Treaties, which represents customary international law on this point, provides that no state may "invoke the provisions of its internal law as justification for its failure to perform a treaty".
>
> Thus, without the Committee's recommended reservation, were a conflict to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in default of its international obligation.

Just as was the case with the Genocide Convention, a reservation is necessary for this Mutual Legal Assistance Treaty to assure that if a conflict arises between the requirements of the Constitution and those of the Treaty, the United States will not be found to be in default of its international obligation. That is why a reservation is necessary to make the supremacy of the Constitution a part of the Treaty itself and therefore enforceable.

Specifically, the Senate should add a reservation identical to the Lugar-Helms reservation added to the Genocide Convention. It simply provides that:

> Nothing in this Treaty requires or authorizes legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States.

Such a proposed would constitute what some would call a category II amendment. It would be included in the instruments of ratification exchanged with the other countries, yet would require no renegotiation. The other party would simply accept it by ratification, and the constitutional rights of Americans would be secure.

JESSE HELMS.

APPENDIX

Excerpt From Hearing of Wednesday, April 20, 1988

The subcommittee met at 10:07 a.m. in room SD-419, Senate Dirksen Office Building, Hon. John Kerry (chairman of the subcommittee) presiding.

Present: Senators Kerry, Pell (chairman of the full committee), Murkowski, and McConnell.

Senator Kerry. The hearing will come to order.

I am delighted to welcome you. Thank you all for coming and being here with us. We appreciate it.

As you know, there are presently before the Foreign Relations Committee several mutual legal assistance treaties: with Mexico, with Canada, the Cayman Islands, the Bahamas and Belgium.

The purpose of these treaties is to assist our law enforcement agencies in getting legal material which can be placed in evidence in our courts and vice-versa in order to assist us in the effort to combat criminal activities, particularly narcotics.

Until those treaties are in effect, we are forced, to rely on rogatory letters which have proved frustrating for our enforcement agencies seeking materials to be placed in evidence.

Those frustrations have led us to seek a process whereby we can deal with bank secrecy laws and deal with other forms of evidence which will assist us in the prosecution of those who are involved in criminal enterprises.

Ideally, that procedure is supposed to facilitate and not prolong the trial process.

Presently, we have four mutual legal assistance treaties in effect, with Switzerland, the Netherlands, Turkey, and Italy. I think it would be useful for the committee if the administration witnesses were prepared to address to a certain degree whether or not these treaties have been successful certainly with respect to the question of bank secrecy laws.

A number of other issues are also at stake here which we want to explore today. One is whether or not you can successfully implement a mutual legal assistance treaty where there is significant corruption within the Government with whom you are seeking to enforce that treaty, and another is whether or not entering into the mutual legal assistance treaty constitutes "full cooperation" in terms of the international narcotics requirements that we have under the Drug Law of 1986.

I am delighted to welcome our witnesses, Mary Mochary—how do I pronounce that correctly?

Mrs. Mochary. That is correct.

Senator KERRY. Mary Mochary and Mark Richard. You have people who are here to assist you. Just for the record, if you could have them identify themselves, that would be helpful.

Mr. ARENA. Mr. Chairman, my name is Drew Arena, A-r-e-n-a. I am the Director of the Office of International Affairs of the Criminal Division of the Department of Justice.

Mr. STEWART. Mr. Chairman, I am David Stewart, Assistant Legal Adviser in the Department of State.

Senator KERRY. Now, if those of you who are going to speak could pull the microphones closer to you, that would be helpful to us.

I think this is important examination, particularly relevant in terms of the actions taken a few days ago on the Senate floor and concerns that we all have about our ability to be able to deal with some of these criminal activities which are ongoing.

I am being joined by the ranking member of the committee, and I would ask Senator McConnell if he has any opening statement he wishes to make or comments.

Senator MCCONNELL. No, Mr. Chairman, I do not. I think we should go right ahead.

Thank you.

Senator KERRY. Thank you, Senator.

Do you want to lead off, then, Mrs. Mochary?

Thank you.

STATEMENT OF MARY V. MOCHARY, PRINCIPAL DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE; ACCOMPANIED BY, DAVID P. STEWART, ASSISTANT LEGAL ADVISER, DEPARTMENT OF STATE

Mrs. MOCHARY. Mr. Chairman and members of the committee, I am pleased to appear before you today to testify in support of six recently negotiated treaties on mutual legal assistance in criminal matters. Five of these treaties are now before the committee for its consideration: The treaties with the Bahamas, the Kingdom of Belgium, Canada, the United Kingdom concerning the Cayman Islands, and the United Mexican States. We expect that the treaty with Thailand will be submitted to the Senate shortly, and we hope that the Senate will consider it along with the five other treaties.

These six treaties are part of a series of modern legal assistance treaties negotiated by the United States to improve our ability to combat international criminal activity.

In negotiating the treaties under discussion today, the Department of State has made clear that it views international cooperation law enforcement as a matter of particular importance in modern international relations.

The Department has emphasized to its negotiating partners that law enforcement concerns are important to all countries, not just the United States. We have stressed that mutual legal assistance treaties can help countries fight back against the enemies within: Narcotraffickers who threaten the stability of well-meaning governments; terrorists who hold the rule of law in contempt; and white-collar criminals who enrich themselves by stealing from honest citizens.

We have also emphasized that the treaties are important because many criminals operate on an international scale, orchestrating illegal activities in the United States from foreign countries.

Our law enforcement endeavors must also reach those who function on this scale.

The fruits of our negotiating efforts are before you today. If I may, Mr. Chairman, I would like to give you a brief overview of the provisions common to all six of the treaties under discussion.

A mutual legal assistance treaty, or MLAT, is intended to enable law enforcement authorities to obtain evidence abroad in a form admissible in our courts. It provides for assistance in all stages of the law enforcement process, including the investigative stage.

An MLAT thus supplements existing international arrangements on exchange of information such as Interpol, and it supplements the mechanism known as letters rogatory. Letters rogatory are written requests from a court in one country to a court in another country for assistance in obtaining evidence.

Letters rogatory tend to be a slow and relatively inefficient mechanism because the requests must pass through a number of bureaucratic steps, including courts in both countries, foreign ministries, justice ministries, and in some cases Embassies. This takes time, which in many criminal investigations and prosecutions is a rare and valuable commodity.

MLAT's by contrast, allow requests to move directly from one law enforcement agency to another. To facilitate assistance, the treaties establish a so-called central authority in each country to process requests for assistance.

On the U.S. side, that means the Office of International Affairs in the Criminal Division of the Department of Justice. On the foreign side, the central authority is typically the counterpart office or agency.

This mechanism for direct contact between law enforcement agencies should greatly expedite requests for assistance. The MLAT's provide for a wide variety of assistance: Service of process; provision of records; location of persons; taking the testimony or statements of persons; production of documents; execution of requests for search and seizure; assistance relating to forfeiture of criminally obtained assets; and transfer of persons in custody for testimonial purposes.

Some types of assistance available under MLAT's, such as transfer of persons in custody for testimonial purposes, are not generally available under letters rogatory. In practice, MLAT's have proven very effective, and over the years there have been numerous instances in which U.S. prosecutorial authorities have obtain valuable assistance through this mechanism.

An excellent example in the *Badalamenti* or *Pizza Connection* case which was tried in the southern district of New York. The trail grew out of the investigation of a number of individuals involved in organized crime, heroin trafficking and money laundering.

Our MLAT with Switzerland provided authorities with critical bank records and depositions for use at trial.

Our MLAT with Italy provided United States authorities with additional depositions, recordings of intercepted telephone conversations, and the appearance as witnesses of Italian policy officers.

Our MLAT with Turkey was used to obtain witness interviews. The trail resulted in 17 convictions.

I have discussed each of the six mutual legal assistance treaties in my written statement which has been submitted for the record. The treaties are discussed in more detail in the Department's letters of submittal for each treaty which are part of the record and in the technical analyses of the treaties which have also been provided to the committee.

In conclusion, I should emphasize that the effectiveness of these MLAT's will ultimately depend on the parties' commitment to use the treaties aggressively and efficiently. An MLAT accomplishes nothing it left unused.

I do expect, however, that all six of the treaties under consideration today will quickly be called into active service.

I respectfully urge the Senate to give its advice and consent to these treaties at an early date, and I thank the chairman for inviting us to appear today and making it possible to have this hearing today.

I will be happy to answer any questions that members of the committee may have. Thank you.

[The prepared statement of Mrs. Mochary appears in the appendix.]

Senator KERRY. Thank you very much, Mrs. Mochary. We appreciate it.

Mr. Richard.

STATEMENT OF MARK M. RICHARD, DEPUTY ASSISTANCE ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY, DREW C. ARENA, DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS, DEPARTMENT OF JUSTICE

Mr. RICHARD. Thank you, Mr. Chairman.

With your permission, I would like to submit my written statement and merely highlight portions of it.

Senator KERRY. We appreciate that. Without objection, it will be entered in the record in full as if read.

Mr. RICHARD. Thank you, Mr. Chairman.

Mr Chairman, members of the committee, my name is Mark Richard. I am the Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. I am most pleased to be here to present the views of the Department of Justice on the five mutual legal assistance treaties which have been——

Senator KERRY. Can you pull the mike a little closer to you?

Mr. RICHARD [continuing]. Submitted to the committee.

My comments will also encompass our treaty with Thailand, which we understand may be submitted soon enough to permit the committee to consider it along with the other treaties.

Treaties designed to obtain evidence from abroad, which are commonly referred to as mutual legal assistance treaties, or MLAT's are relatively new phenomena. The first such treaty was our agreement with Switzerland which entered into force in 1977. Since that

time, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Monserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom.

The negotiation and implementation of effective mutual legal assistance treaties and executive agreements are very important aspects of our effort to investigate and prosecute serious crime. It has been increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLAT's is to provide a reliable and efficient means of obtaining this evidence.

Inasmuch as the Department of Justice has prepared detailed technical analyses of each of the treaties, which were, incidentially, prepared by our negotiators, I would like to speak today in more general terms about why we view these treaties as important instruments in effectively investigating and prosecuting serious crimes.

At the same time, it is important to note that these treaties are not panaceas. They will not resolve the problem of international crime, though they can be extrermely useful to that end.

Our experience has demonstrated that how effective an MLAT ultimately proves to be depends as much on the good faith and commitment of the parties as it does on the specific language of the instrument.

It also requires that parties have a frank and productive working relationship over time in implementing the treaty.

An MLAT generally can substitute for the use of letters rogatory in criminal cases. Letters rogatory are written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance needed in a judicial proceeding.

Because we presently have only a small number of mutual legal assistance treaties and executive agreements in force, in the absence of an MLAT we use letters rogatory to obtain evidence when dealing with foreign countries.

MLAT's provide, from our perspective, a much more effective means of obtaining evidence. First, an MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. Letters rogatory, on the other hand, are executed solely on the basis of comity and discretion.

Second, an MLAT, either by itself or in conjunction with domestic implementing legislation, can provide an effective means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale criminal activities such as narcotics trafficking and white collar crime.

Third, in an MLAT we have the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include, for example, the use of certificates needed to admit foreign business records or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad.

Thus, MLAT's can establish a procedural framework for ensuring that the evidence we obtain will comport with our evidentiary requirements and ultimately be admissible at trial.

Fourth, our MLAT's are structured to streamline and make more effective the process of obtaining evidence. Each of our MLAT's provides for a central authority which is responsible for making and executing requests under the treaty.

In effect, the central authorities are, in fact, the justice departments of the two countries, and they deal directly with one another on all treaty matters.

Comparing the way in which letters rogatory and treaty requests are made illustrates the virtue of treaty procedures. In the case of letters rogatory, an assistant U.S. attorney must apply to the district court for the issuance of letters rogatory and file a set of pleadings, including proposed letters rogatory.

Once signed by the court, the letters rogatory must then be presented through diplomatic channels. This means it goes from the prosecutor to the Department of Justice to the Department of State to the appropriate U.S. Embassy to the Ministry of Foreign Affairs to the Ministry of Justice and finally to the court which will execute it.

The evidence obtained through this process is then transmitted back to the requesting prosecutor through the same tortuous route.

The process for a treaty request is quite different. The prosecuror or investigating agent seeking the evidence works directly with our Office of International Affairs which is, in fact, designated as our central authority, in preparing the request. It is signed by the director of the office.

The request is then sent directly to the central authority of the treaty partner, which will either execute the request or refer it to the appropriate court or law enforcement agency for execution. The route for the return of the evidence is the same.

While each of the treaties now before the committee shares the characteristics and toals I have outlined, the specific provisions of the treaties do, in fact, vary. In some cases, the differences are merely semantic. In others, however, they are in fact substantive.

Having certain substantive differences among the treaties is the inevitable result of bilateral negotiations over a period of years with six countries which have differing legal systems and domestic interests and with which the United States has differing law enforcement relations and priorities.

The treaties before the committee are, in fact, a reflection of our past and present law enforcement relationships and priorities with our treaty partners.

For example, there is no country with which we have more extensive or more productive law enforcement cooperation than with Canada. With this foundation and the advantages of a shared legal tradition, we expect our MLAT with Canada to be our most frequently and most effectively used treaty.

On the other hand, we would be naive to expect that the MLAT with Mexico, which shares our southern border, could be as easily utilized. Mexico has a very different legal system, and those differences have shaped the language of the treaty, as has our history of relations in the law enforcement arena.

Our priorities in combating narcotics trafficking and money laundering contributed to our efforts to negotiate viable MLAT's with the Cayman Islands, the Bahamas, Mexico, and Thailand. In the case of Canada and Mexico, our shared borders and the resultant volume of criminal cases requiring bilateral cooperation were also important factors.

With Belgium, we had an opportunity to negotiate in a rather short period of time an MLAT with the European country that is, in fact, the major commercial and financial center and, in so doing, hopefully to set the stage for MLAT negotiations with neighboring countries with legal systems quite similar to those of Belgium, including France.

From our experience with the treaties now in force, we have learned that MLAT's can be an extremely valuable tool in obtaining the evidence we need to successfully prosecute major crimes.

In the 10 years since our treaty with Switzerland entered into force, we have refined certain of our positions on the many issues that may arise in negotiating an MLAT. We have learned much during this process and are still learning. Each treaty is the product of a unique negotiating history. None is a perfect instrument. Each MLAT is different from the next, and each is a complex instrument and reflects the peculiarities of our own and our treaty partners' laws and procedures.

Accordingly, we appreciate the considerable task the committee faces in analyzing these MLAT's. I would be pleased at this time to respond to the committee's questions, including any written questions the committee may wish to pose after the hearing today.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Richard appears in the appendix.]

Senator KERR. Thank you very much, Mr. Richard, and I appreciate your——

Senator McConnell.

Senator MCCONNELL. I was just saying to the chairman I have a markup in the Agriculture Committee. I just wanted to ask one question and then I am going to leave.

Will these treaties help you with the bank secrecy problems, in piecing the veil of secrecy, a problem that we have in a number of these countries?

Mr. RICHARD. We certainly hope so and anticipate that it will be very effective primarily in the areas of bank secrecy and overriding the restrictions on gaining access to banking information.

The precise method for accomplishing that does, in fact, vary from treaty to treaty though.

Senator MCCONNELL. Thank you, Mr. Chairman.

Senator KERRY. Thank you very much, Senator McConnell.

Let me ask a quick question procedurally on a couple of other treaties, and then I would like to get into some substance here. The Canadian treaty was signed in March 1985, but it was not submitted to the Senate until February 1988.

What was the reason for that long delay?

Mrs. MOCHARY. Many of these treaties require enabling legislation in order to have one or the other of the treaty partners have the ability to carry out its treaty obligations.

In the case of Canada, that was part of the deal. The Canadians did have to enact enabling legislation in order to make them able to carry out to the full extent their treaty obligations under this treaty. And we had agreed that we would not submit the treaty for ratification until the legislation was in place.

In fact, that legislation is not completely in place, but we understand that it will be fully done by the end of June. It is now in its second reading.

Mr. RICHARD. If I may just add one point from my own personal recollection, the Canadians indicated that their process required that even before formulating the legislation they have to go to each of the provincial governments and obtain their approval and consent to each of the provisions, and the process in Canada was extremely tedious.

Senator KERRY. Was Canada purposely treated differently from other countries? For instance, in the case of the Bahamas you specifically stated—I mean, you sent it up right away, but you stated at the time that the Bahamas had to pass certain enabling legislation, that it was not going to restrict the treaty, et cetera.

Mrs. MOCHARY. Our policy is that we do like to have the enabling legislation in place before we send it up.

Senator KERRY. Why was the Bahamas different?

Mrs. MOCHARY. The Bahamas' enabling legislation is in place.

Senator KERRY. It was not in place when you sent it up.

Mrs. MOCHARY. It was not in place when we sent it up, but we understood that it was on its way, and we also——

Senator KERRY. How is that different from Canada, is what I am getting at?

Mrs. MOCHARY. Canada's is on its way, too.

Senator KERRY. But you did not send it up for 3 years.

Mrs. MOCHARY. That is true, but that is because we had a clear understanding with the Canadians that we would not do so.

With the Bahamians, what we were trying to do was maximize our leverage in terms of getting them to get their legislation in place.

Senator KERRY. What was the reason for the understanding?

I am just trying to understand the distinction here, why we treat these differently. Do we have a strategy as to all of them?

Mrs. MOCHARY. Mr. Richard will explain the Canadian situation.

Mr. RICHARD. We have learned from experience that one situation that may occur with respect to mutual legal assistance treaties is that what is given in the treaty is taken away through the implementing legislation. For example, shortly after the conclusion of the treaty with Switzerland, the Swiss Confederation enacted enabling legislation which, not necessarily intentional, but had the effect of establishing an enormous appellate procedure within Switzerland which added considerable length of delay in executing our request.

This in effect was of tremendous significance to us in terms of our ability to quickly get our requests executed. Thus, we obviously are very much interested in the type of legislation which is ultimately enacted by our treaty partner designed to implement this treaty.

We had discussed pretty thoroughly with the Canadians exactly what shape they had in mind for their implementing legislation, and our enforcement history with Canada was such that we had no doubt that they were headed in the direction that we were certainly interested in seeing them go.

I'm not sure the same level of confidence necessarily existed with other countries, including the Bahamas.

Senator KERRY. Would that be a reason to then hold the Bahamas treaty and wait and see what they do to it?

Mr. RICHARD. I think we have accomplished, as Mrs. Mochary indicates, the leverage that we wanted to exert on the Bahamians.

Senator KERRY. The Thai treaty was signed in 1986, but we still have not received it. Is there a problem with the Thai treaty?

Mrs. MOCHARY. The enabling legislation has not gone through. And we do not know. We understand that they are working on it and it is in the process of going through. And then you ask, "Well, how come you are sending it up?"

Well, we do not have that many openings here, and we thank you for creating the opening now for us to testify on it. When you create an opportunity for us and we think that there is a possibility that we may get favorable action on the treaties, then we have to take that opportunity.

So, in the Thai case, the legislation in Thailand is not in place. But because you are having these hearings, we think it would be a good time to send it up for your consideration.

Senator KERRY. Well, I can assure you the committee will be anxious to move on these. I candidly did not know that they were awaiting our action. I do not think anybody was pressing very hard on it.

But we are happy to, obviously, try to move on them.

Let me come to probably some more compelling issues. Let me ask you, Can you cite some examples for the record where this process has worked most effectively and efficiently and helped us?

Can you give us examples of the Benefits of it?

Mr. RICHARD. Certainly the most dramatic that comes to mind is with Switzerland, where we had back in the early seventies major problems piercing Swiss Bank secrecy with respect to gathering evidence on a whole selection of criminal offenses.

The treaty negotiated is not as broad as we would otherwise desire. It does not reach certain offenses. But nevertheless, it has proven very effective in many specific case instances, and I would say by and large it has proven to be a very valuable instrument.

I suspect—again, this is just anecdotal—that the treaty with Italy will—it has already demonstrated its ability to bring both government law enforcement agencies together in a new cooperative venture directed against a variety of criminal offenses, including narcotics and organized crime.

We have recently, just to further successfully implement the treaty and given its volume of usage, we have at the Department of Justice and with the cooperation of the State Department, assigned one of our attorneys to be stationed at our Embassy in Rome just to further facilitate utilization of both the mutual legal assistance treaty and the extradition treaty with Italy, which is also very effective as an instrument.

But I want to stress that in our experience the country's will to make it work is critical, at times almost more than the actual word of a particular article; that you can frustrate implementation if that is your intent.

Senator KERRY. That brings up, I suppose, one of the major issues that we want to discuss, which is that if you are aware that there is significant corruption within one of these countries with whom you are signing this agreement, are we really getting anything for the agreement, and should we sign agreements with countries that we know have significant government corruption?

And I am speaking specifically of Mexico and the Bahamas.

Mrs. MOCHARY. I would like to speak to the Bahamas issue. First of all, in general terms we are certainly better off with a treaty that requires them to, another country, to cooperate in law enforcement than without, because without the treaty they can always say, we have no basis for provising this information.

And with the treaty, they would not only be denying our request, they would also be violating international law if they did not provide the information that they were required to provide.

Senator KERRY. I just want to explore this so that the record is clear. And I think the answers are important. If that is true and we want to have international law be upheld and it is better to have them be accountable to that, taking a country like the Bahamas, where the State Department itself has said on specious legal grounds they have upheld the extradition of Nigel Bowe. Is there anything that makes you believe that they will be less than specious in their application of the MLAT?

Mrs. MOCHARY. The Bahamas has been, on a working level has been very cooperative recently in narcotics enforcement and law enforcement in general.

Senator KERRY. You use the term "working level." That and "operational" are becoming art forms in this process.

Mrs. MOCHARY. In addition to that, we believe that the attorney general has a commitment to carry out this MLAT, and to continue to work with the United States in cooperation in law enforcement issues.

Senator KERRY. I do not think you are answering my question. My question is, What is there to make us believe that, if they do not follow through on an extradition treaty, that they will treat this differently?

Mrs. MOCHARY. I am sorry, I did not understand that that was the question.

So, think that it is important to understand that they have followed through on the extradition treaty in the past. Prior to the Nigel Bowe case, we had several extraditions from Bahamas.

What happened in the Nigel Bowe case is that Nigel Bowe is himself an attorney and he hired very good counsel, and for the first year or so we were just outfoxed in terms of the level of representation. Then we hired very good counsel and——

Senator KERRY. I thought we already had very good counsel working for us. You mean we have to go out and find good counsel?

Mrs. MOCHARY. No. In general, we ask for the government to—the requested State to provide and counsel. And what happened was that, frankly, the private attorneys hired by Nigel Bowe did a

better job than the government attorneys, the Bahamian Government attorneys.

Senator KERRY. Well, what happened to the assertion in last year's international narcotics control report that it was being upheld on specious legal grounds? That was the conclusion of the State Department.

Senator KERRY. Well, we felt that the reasoning of the court was incorrect. However, based on the better arguments that were presented and procedural superiority that was carried out by the attorney for Nigel Bowe , we now understand what happened.

Senator KERRY. But we were represented by the Bahamian attorney general?

Mrs. MOCHARY. By his office, that is right.

Senator KERRY. Does that tell you something?

Mrs. MOCHARY. That is three people.

Senator KERRY. That does not tell you anything more than that?

Mrs. MOCHARY. It tell us that they do not have adequate manpower in these circumstances.

We entered this negotiation in the background of the kind of information that you have just presented, and on several occasion the AG said to us: "The prime minister is another cabinet member; he is not my boss; and I report to the cabinet, not the prime minister."

And that, along with the whole atmosphere of the negotiation and the subsequent actions by the attorney general when he was appointed to be in charge of the police—he took over as the head of the police about a half a year ago—have indicated to us that there is reason to hope that law enforcement cooperation will substantially improve.

In addition to that, in the Nigel Bowe case we are making progress.

Senator KERRY. Well, I guess maybe I am a little confused. I am having a hard time understanding what the relationship is between the quality of the attorney and the specious legal grounds. Specious legal grounds are specious legal grounds. It does not matter what the quality of the attorney is.

You, see, the trouble here is that Nigel Bowe obviously represents a significant link to real reform and to real anticorruption efforts.

And I am trying to understand how an MLAT with a country that is unwilling—have you been following the Carlos Lehder trial at all?

Mrs. MOCHARY. A little, in the press.

Senator KERRY. You have seen testimony under oath in the Carlos Lehder trial that our Government is relying on in the prosecution of Lehder that the highest levels of the Bahamian Government have been paid money and are corrupt. If that is true, what do we gain by entering into a mutual legal assistance treaty which is supposed to help up get evidence against the very people we are entering into the agreement for?

Is there really an expectation that it is going to be helpful? Or are we creating another legal morass for ourselves?

And incidentally, in principle I support this concept. But I am trying to draw you out on what the benefits are.

Mr. RICHARD. Let me give you, if I may, my response to your question, which is obviously a very good one and a critical one that should be addressed. I am not sure in the world we are forced to operate in that we are in a position to walk away completely from trying to develop some methodology, if you will, with these countries to gather as much evidence in usable fashion as we can for use in this country.

I cannot assert to you here that the treaty might never be distorted by one or more of our treaty partners, for whatever personal reason or political reasons, what have you. A particular request may be distored from time to time. I do not know.

But I can tell you this. In my judgment, while it may be frustrating, the execution of the agreement in particular cases, we have to weigh against that the fact that if it works 90 percent of the time we are able to deal with a certain quantum of criminal offenses in this country that we would not presumably be able to deal with, at least as effectively, if we did not have the treaty.

Moreover, I do think that you have, with this treaty in place, something more than merely anecdotal material to measure a country's willingness to cooperate. We can be here next year or a year after the Bahamian treaty is put into place and you can legitimately ask, How many requests did we send, what was the reaction, what kind of cases, what were you asking for?

And you can see if there are patterns, if you will. You can examine these cases. And I think you would be able to get a very accurate picture of the Government's response to law enforcement requests emanating from this country.

Moreover, turning for example to Mexico accomplishing an MALT with Mexico, notwithstanding all of these legitimate issues that you raise, has tremendous, in my judgment, tremendous potential impact on the rest of Latin America. It will be the first MLAT with a Latin American country, the first attempt with Latin America to reconcile the two systems so as to afford a mechanism for cooperation.

And I think quite candidly that that is a very significant step. That is not to suggest that the treaty is a perfect one.

So, I would respond in that way to your question. Thank you.

Senator KERRY. I think that is a good response, and that is really what I am looking for. And I think that those are good reasons that one can hang one's hat on.

Is there any risk that those corrupt elements can turn this treaty around and use it as a means of infiltrating or getting infiltration that in fact could be detrimental to the law endorcement effort?

Mr. RICHARD. To answer you question, yes, there is a risk. And we in our central authority, working with the prosecutors, whether it be the Federal or State and local levels, have to be sensitive to this.

But there are mechanisms within the treaty to ensure that, consistent with the treaty, we do not have to prejudice our ongoing efforts, if you will, on investigations, prosecutions, identities of informants, and what have you.

There are legitimate clauses that can be cited to minimize these risks. And obviously, as we implement them we have to be sensitive to them. Our experience, though, and what we strive for with

the central authorities structure is to develop a rapport over a period of time with the people we will be dealing with, so that hopefully through experience we are able to establish at least to our satisfaction that certain channels are reasonably pure, if you will, and that you can trust them and they are reliable.

And this is based on our experiences with those channels. And you are able to establish a dialog, hopefully one that advances law enforcement objectives, and you know when you are running risks and when you are not. But this takes time.

Senator KERRY. You have very articulately stated why you think there are benefits to this, and I agree with you that on balance I think that is accurate.

What are the worst down sides? What are the worst risks?

You take that argument, you balance it against the negative. What is the worst negative? What are we looking at that people could say, this is a bad idea because?

Mr. RICHARD. Well, quite candidly, if you reject the treaty we are back where we are now. We are in a rogatory process, which certainly has proven to be very ineffective, unpredictable, and does not suit our enforcement needs. This is the down side, if you will, of abandoning the approach.

In a particular case, you know, the down side could be very significant. You certainly do not want to prejudice and ongoing investigation, for example, by ending up giving the very information that you are trying to develop and protect in a channel where the bad guys get it.

For example, from my perspective, I am in no rush to see Colombia ratify our mutual legal assistance treaty, which is awaiting the action of the Colombian Parliament.

Senator KERRY. Well, under the terms of this agreement, in fact under the terms of all six agreements, there is a clause which permits you for a so-called public interest, correct, to deny a particular request for assistance? Accurate?

Mr. RICHARD. That is correct, something like that in each of the treaties, yes.

Senator KERRY. Does that clause get defined in a way that permits you to assert an ongoing investigative effort and therefore you do not want to—you do not want to provide the specific information because it might jeopardize a specific case that is ongoing?

Is that what fits under the definition?

Mr. RICHARD. Generally not. There are other provisions in these treaties that would accommodate the need not to disclose materials of ongoing investigations that you do not wish to disclose. Sometimes you may wish to.

Senator KERRY. How is that term construed in these treaties?

Mr. RICHARD. The term of essential interest?

Senator KERRY. Yes.

Mr. RICHARD. Generally, it is an attempt to capture a concept which is taken for granted in civil law countries, both in Europe and Latin America, called public order, which is—it is an interest which is fundamental to the society.

And I can assure you that I have been in discussions that go on endlessly trying to define at least the European and civil law concept here. But I would try to describe it as an essential, fundamen-

tal interest that is of critical importance to the society, to the Government.

I would rely on other provisions of the treaty to either postpone executing a request, defer it, get pledges of confidentiality. So, it is really as a means of——

Senator KERRY. So, as I hear you, it is a very high level of scrutiny that would have to apply to that.

Mr. RICHARD. What we do not want to happen is that phrase to be used to turn a treaty that is based on obligation into a discretionary treaty, so we do look, and you will see in our analysis, our technical analysis, the constant theme that this is not to be lightly resorted to.

Senator KERRY. Would it be your expectation that when we are here measuring the cooperation of a particular country in our antinarcotics effort, that it would be unusual and indeed even extraordinarily rare that we would be confronting the invocation of that particular clause as part of that measurement? I mean, we are not going to sit here and have 10 public interests or 5, and people say "Well, this is what we contemplated at the time, and it is perfectly legitimate." It would really be a very high level of scrutiny, it would be an extraordinary situation, it would be highly unusual for a country to do that; is that accurate?

Mr. RICHARD. That is correct. I am siting here wondering, and maybe if I can just ask my colleague, whether we have ever seen an invocation of that provision in any of our existing treaties. I am not aware of it.

Senator KERRY. We only have four existing. We are about to conceivably implement six, five immediately; correct?

Mr. RICHARD. But with Switzerland alone we have had hundreds of requests over the 10 years.

Senator KERRY. Has Switzerland ever invoked that?

Mr. ARENA. No, Senator.

Mr. RICHARD. I agree with you.

Senator DERRY. So, it would be fair for us to measure a Bahamian or Mexican or some other country's refusal as against the Swiss experience?

Mrs. MOCHARY. The type of thing that we talked about when we were negotiating these treaties were things like that classified information that would affect national security, information that might put in jeopardy the life of an informant. That is the type of information that we were thinking about, and we have tried to narrow the scope of this exemption. However, I think it would be impossible for us to speculate how many times it would be used or could be used.

Senator KERRY. But it would be fair, would it not, to measure it against the Swiss experience as an experience where we have been able to measure our requests and understand what should be forthcoming as a matter of the course of this process of the MLAT treaty.

Mr. RICHARD. It would be apparent once you saw a pattern emerging, Mr. Chairman, what was going on here.

Senator KERRY. Now, if a country does not live up to the terms of the Mutual Legal Assistance Treaty, is there any remedy other than simply disallowing the treaty?

Mrs. MOCHARY. Criticism, which is the answer to the previous question that you asked. You asked are there any down sides to this treaty, and well one of the major down sides from our point of view is that if we choose not to abide by the terms of the treaty for a particular reason or deny assistance for a reason that may not be convincing to our treaty partner, we would be criticized for it.

Senator KERRY. On the bank secrecy issue, almost every single law enforcement agency in the country has accepted the notion that getting at the fruits of the crime assets, particularly the money in the cash transactions, is one of the best ways that we can get at the narcotics problem.

The Cayman Islands and the Bahamas have both been major offshore financial secrecy jurisdictions.

Do these treaties in a specific way assist our law enforcement efforts with respect to those two places and bank secrecy?

Mr. RICHARD. Yes. Categorically, they are designed to do that. They should provide us with a mechanism for gaining access to bank records and business records that have heretofore been embraced by the bank secrecy laws in situations that include narcotics trafficking, money laundering, and even some tax cases.

Senator KERRY. So, it is your full expectation and understanding that these treaties as contemplated with both the Bahamas and the Cayman Islands will facilitate our access to bank records and business transactions.

Mr. RICHARD. That is correct.

Senator KERRY. Do you know of specific requests that we expect to make of both of those places in the near future?

Mr. RICHARD. I am not sure whether we have accumulated a stockpile yet.

Mr. ARENA. Mr. Chairman, yes. We have prosecutors waiting for——

Senator KERRY. Lining up, I hope.

Mr. ARENA. Lining up, Senator.

Senator KERRY. And you expect to, with respect to both places, both the Cayman Islands and the Bahamas?

Mr. ARENA. Yes, sir, but let me add that a very important aspect of that is the respective implementing legislation in each jurisdiction, and it really is the combination of the treaty provisions plus the implementing legislation which will enable us to pierce the secrecy veil for our prosecutors.

Senator KERRY. Now, will it be a fair measure of full cooperation on the part of the Bahamas as to whether or not they pass this enabling legislation forthrightly?

Mr. RICHARD. Oh, I would say by all means.

Senator KERRY. And what is your expectation as to the timeframe on that action?

Mr. ARENA. It is my understanding that it has passed both houses of the Bahamian parliament.

Senator KERRY. And should be law when?

Mrs. MOCHARY. It sits with the cabinet now, and——

Senator KERRY. So, we should obviously be able to anticipate the appropriate full application of these treaties with the Bahamas immediately almost.

Mrs. MOCHARY. Yes, particularly with the Bahamas because the treaty with the Bahamas, from their point of view, went into force as soon as it was signed. There was no further ratification that was necessary from their point of view.

Senator KERRY. And did we make an effort to breach, during the negotiating process with the Bahamas, did we make an effort to penetrate the existing bank secrecy laws in the course of that negotiation?

Mr. RICHARD. When you say penetrate, we have negotiated a process that should give us access to bank records and business records.

Senator KERRY. So, you are saying before this committee, as we consider the ratification, that the Bahamas has agreed and it is your understanding they are on record and will proceed to assist us in the penetration of the bank secrecy laws.

Mr. RICHARD. In cases that fall within the scope of the treaty.

Senator KERRY. And what will that process be? What is the process by which you expect that to happen?

Mr. RICHARD. We would have to prepare a request along the lines set out in the treaty containing the information set out in the treaty, transmit it to the central authority from the Department of Justice to the Department of Justice, in effect, our counterpart, and they would have the obligation, if you will, pursuant to their implementing legislation, to take all necessary steps to gather the information, assuming the request falls within the ambit of the treaty, and there are no exceptions.

I want to stress that not all offenses in the Bahamian treaty are necessarily embraced by this document. Likewise in the Caymans, there are classes of offenses which would not otherwise——

Senator KERRY. I understand that. I understand the distinction drawn between them. In fact, that raises some other questions that I wanted to ask you later, but what is the timeframe by which time the counterpart authority in the Bahamas must respond by?

Mr. RICHARD. I am not sure. Certainly the treaty does not set out a particular timeframe.

Senator KERRY. Is there an understanding?

Mr. RICHARD. No, not that I am aware of.

Senator KERRY. Is there an expectation?

Mr. RICHARD. Senator, I would say obviously we expect it to be done in a timely fashion, and I keep on going back in my mind to our experience with the Swiss where their implementing legislation set up such a cumbersome procedure that neither——

Senator KERRY. What is the timeframe that the Swiss take to respond?

Mr. RICHARD. We have been working with them to reduce the time period, and they are now considering amending their legislation to compact the timeframe for appeals.

I think in the past, if there were objections, you would probably go into 12, 16 months, but I am speaking off the top of my head.

I can certainly supply you with the figures.

Senator KERRY. And the grounds for those objections, were the grounds set forth within the treaty itself?

Mr. RICHARD. Generally, if I am not mistaken, they are set forth primarily in the implementing legislation.

Senator KERRY. And can you just for the committee's edification describe to us what the nature of some of those grounds of objection have been with the Swiss?

Mr. RICHARD. They would—an account holder or someone who had an interest in an account, and therefore under Swiss law would be an "affected person" affected by a proposed disclosure, would be able to come into the court and assert, one, that—he would get a copy of the request and would be able to challenge it as one beyond the scope of the treaty, other procedural type of issues and part of the problem with the Swiss implementing legislation, it permitted these affected persons, if you will, to challenge on an ad seriatim basis, so that if you had 20 affected persons, as I understand it, they could line up, and as the challenge No. 1 was resolved by the Swiss court, then you begin with challenge No. 2, so you had to go in seriatim fashion to address each of these challenges.

The Swiss, I believe, pursuant to a consultative process set out in the treaty, have been trying to address this to consolidate all the appeals into one proceeding because they, too, acknowledge that the whole process frustrates the intent of the treaty

Senator KERRY. Before I turn to Senator Murkowski, who is now here with us, let me just ask a couple of quick questions on that, and then I want to come back to Mexico and a few other areas.

Is there a similar expectation in the enabling legislation of the Bahamas? Do we anticipate enabling legislation with the Cayman Islands?

Mr. ARENA. It is already in place.

Senator KERRY. Mexico?

Mr. ARENA. No, we do not need it.

Senator KERRY. Is there an expectation of a similar intervening-intervenor process, et cetera, that could pose delay with respect to those treaties as with the Swiss?

Mrs. MOCHARY. You mean those treaties going into force?

Senator KERRY. I beg your pardon? No, not going into force.

What I am trying to say is, and I am trying to just make the record very clear here so that in the future we are not surprised by what takes place, obviously, is there an expectation that if we made a request of the Bahamas or of Mexico, that they likewise, as the Swiss have, could respond with an intervenor type of process where someone can say we might be affected and we could go as long as a year? Is there an expectation of that kind of delay in those treaties?

Mr. RICHARD. No, but let me just point out that, you know, on the flip side, a request by any one of these countries under the treaty for access to American bank records would set in motion a variety of appellate opportunities for an account holder to challenge production of those records. So, it is not the challenge itself that is of concern because that may accord due process.

Senator KERRY. It is the legal process that flows thereafter.

Mr. RICHARD. We would look to the process employed, the time to resolve these challenges, and the speed for resolving these kinds of disputes. And I think that would be the measurement rather than merely is there a process to challenge it.

Senator KERRY. Does that problem with the Swiss of the time, of the year or 16 months, raise any problems in terms of our prosecutors and the speedy trial requirements?

Mr. RICHARD. Not necessarily the speedy trial. As you know, Congress recently passed a provision with tolling.

Senator KERRY. A tolling process, yes.

Mr. RICHARD. But of course, delays inherently work against the interests of the prosecutor, in my experience anyway, and frequently frustrate prosecution or dilute its force, if you will.

Senator KERRY. Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

I just have one question with regard to Canada, and that is the question of dual criminality.

I wonder if you could enlighten me as to just what the intent is in the event that Canada does not require that the conduct under investigation be an offense in both countries, and theoretically, if we were to have a situation where, say, with acid rain, Canada were to enact criminal laws, where do we go from there? And this is a potential threat because there is a great deal of concern.

Mr. RICHARD. Senator, I would respond in the following fashion.

We have, as previously indicated, the ability to deny a request if it is contrary to vital national interest, if you will, but on the other hand, this is a mutual legal assistance treaty. If they are asking, for example, they are invoking article XII, I think, of the treaty, which merely asks us pursuant to the treaty for public record information, we might very well be willing to give that kind of information under the treaty without any trouble, regardless of the nature of the request and the fact that there is no dual criminality.

Our evaluation would depend on what is it that they are asking us to do under the treaty, and——

Senator MURKOWSKI. Well, let's make an assumption that in this case Canada were to specifically enact criminal laws with respect to acid rain, and it would appear that their objective is to address their concern over the problem, and since we do not have, say, in this case, a statute covering that, they would attempt to get our cooperation so they could pursue a criminal charge.

Now, under that kind of a scenario, what are we prepared to do? Do we have a policy, or is it just at the whim of a Secretary to designate to what extent we might be cooperative, or do we have an obligation to protect our own domiciled corporations since we do not have a law that specifically entitles them to have that information?

I am just trying to get at what kind of flexibility there is, and maybe, Ms. Mochary, you may have a comment. You look like you are getting ready to say something.

Mrs. MOCHARY. Under the terms of the treaty, once the treaty is signed, the cooperation takes place between the two justice departments of the countries, so the Secretary of State no longer is involved directly in deciding when there will be and when there will not be cooperation. But we purposely tried to negotiate treaties which do not limit us to dual criminality because we have so many laws, so many things that are illegal in the United States that are very important to us to pursue which are not necessarily illegal in other countries, and we expect cooperation in the pursuit of those

criminal cases; that is, where they are illegal here and not necessarily illegal in another country.

So, the reverse I would assume would also be true because there thas to be reciprocity in these treaties.

Senator MURKOWSKI. Well, take me back to the acid rain specifically.

What are you going to do?

Mr. RICHARD. When you say take acid rain, the fact that we have no specific statute that would be comparable, I am not sure is the cirtical point because we do have a variety of statutes that do apply to situations where, whether it is through gross negligence or other types of activities in the workplace make certain types of activities criminal, if you will, OSHA violations and what have you. So, there conceivably are analogs, if you will, although we may not have one precisely dealing with acid rain.

I would look, Senator, first at what it is they are asking us to do. I would look at the type of prosecution and the statute that they are operating under,and evaluate it along those lines.

Senator MURKOWSKI. Well, for example, let's take one extreme. What kind of thing might they ask you to do that you probably would not do.

Mr. RICHARD. Would not do?

Senator MURKOWSKI. Yes, that would be going too far. Give me that extreme.

Mr. RICHARD. Senator, I am quite candidly not well enough versed with the issues in acid rain to answer the question because my initial reaction is I would perform as I am obligated to do under the tready.

Now, there is a series of things that can be requested. I will say that if they were requesting searches and seizures in the United States, their searches under the treaty require that they be carried out in accord with domestic law, so if they were asking us to performs a search and seizure in the United States to support a prosecution, we would then need approval of the court in order to go forward, and the court very well may seek in the context of searches and seizures, a dual criminality standard. The law in this area, I would submit to you, is ambiguous.

But on the other hand, there may very well be the kind of requests that are fairly innocuous, or the type of requests that are not particularly intrusive. They may ask us to approach a witness in the southern part of the country and ask whether that witness would voluntarily come to Canada to provide testimony or produce records without any compulsion. My inclination would be, sure, why not?

So, it really would depend on a variety of factors, Senator.

Senator MURKOWSKI. Well, I guess that is the very point. With Canada, we have several issues that we view in a different light, our environmental issues, our fishing issues, a question and we had an extensive discussion yesterday, Mr. Chairman, in the Energy Committee being briefed on the Canadian Free Trade Act which is pending and the realization that Canada continues to subsidize various resource development areas within their country, and we do not, and I guess I am a little concerned about the merits of this treaty where we have this void on, you know, what do you do if the

Canadians come down and make certain demands because we do not have a dual or a reciprocal agreement on criminality.

Mr. RICHARD. Senator, we have the ability consistent with the teaty to address your concern, I would submit. If this is an issue of national interest, an issue of essential importance to the United States, the way I interpret the proposed treaty provisions we would have a basis consistent with the treaty to deny the request.

What I guess I apologize for is I do not feel versed enough to know what a policy judgment would be on this particular issue.

Senator MURKOWSKI. I gather that policy judgment would move over from State to justice and be determined at justice on the recommendation to a higher authority within justice right?

Mr. RICHARD. Senator, one of the attributes of this whole process has been the developing close relationship between the Justice Department and the Legal Adviser's Office of the State Department.

I would anticipate that if there is any question along the lines that you suggest that there would be signiticant consultation within the executive branch of Government as to where our national interests lie. Are we in a situation where we have to invoke this other provisions of the treaty to deny the request because it is contrary to our national interest?

I assume that there would be significant consultation before judgment was made on this point.

Senator MURKOWSKI. I think that satisfies my concern. Thank you.

Senator KERRY. Thank you very much, Senator.

Just a few more questions, and I think we will be able to wrap up at least the open oral part of this. We do want to keep the record open, and I know that there are a number of questions which are more detailed that we would like to submit for the record if we can just to complete it here.

What is this going to cost, particularly something like the Cayman Islands where we are assuming for the first time the burden of payment for the provision of these materials, et cetera? Is there an estimate or an expectation of costs with respect to these?

Mr. RICHARD. I do not think we have one to provide you.

I would add, if I may, just by way of background on this particular provision, I recall the Cayman Island argument was that there was an expectation on the part of both sides that by and large our requests would far outnumber their requests and that we have already recognized the burden of searching and locating records on financial institutions as incorporated in the Bank Financial Privacy Act and that it is only appropriate, given the anticipated volume of requests, that we address this problem of burden.

Mr. ARENA. Mr. Chairman, if I could just add?

Senator KERRY. Yes, Mr. Arena.

Mr. ARENA. While we have not had a chance to do a cost analysis of the prospective MLAT's, our experience with the haven jurisdiction executive agreements has been such that the information prosecutors are able to obtain about the route of proceeds has ended up in forfeitures in the United States of those narcotics proceeds, which I would venture have more than paid for the cost of obtaining the records.

We can expect, I hope, that will continue so that if it leads to seizure of assets that have come back into the United States it will be at least a wash, if not a profit.

Senator KERRY. Have we had a bank secrecy problem with Canada?

Mr. RICHARD. A bank secrecy problem? No, but I am inclined to say we have had problems because under their existing legislation you must have an outstanding indictment, I am not mistaken, before they can assist us. So that there is an impediment in terms of the stage in which we can get assistance.

Senator KERRY. Will this MLAT permit us to get from Canada bank records during a criminal investigation?

Mr. RICHARD. Yes.

Senator KERRY. How about with respect to the Cayman Islands? Are you convinced that the agreement with the United Kingdom will end the use of the Caymans as a money laundering location?

Mr. RICHARD. I am a cynic, Mr. Chairman. The agreement, I anticipate, will afford us an opportunity to go into these banks and get the records we want. My hesitancy, though, is that the schemes designed to cover up the true nature of accounts are just limited by man's ingenuity, and I am not sure that this treaty will address the ability of people to devise schemes to cover up their financial transactions.

Senator KERRY. That is not very encouraging, is it?

Mr. RICHARD. What we are seeing, though——

Senator KERRY. I am not suggesting that you ought to be if you cannot be. I am just saying that is not very encouraging.

Mr. RICHARD. No. The treaty is designed to open up the banks for offenses covered by the treaty. I would be extremely disappointed if it did not accomplish that, but I would say that, unlike the Bahamas, in the case of the Caymans if that ended up to be the case I would certainly be consulting with the State Department and urging that they sit down with the United Kingdom representatives and address the problem there, because it certainly was the intent of the negotiators that it open up the banks.

Senator KERRY. Now, we have an extradition treaty with Mexico; correct?

Mr. RICHARD. Correct.

Senator KERRY. It is my understanding that those who are involved or alleged to be involved in the murder of Enrique Camerena have not been convicted because of evidentiary issues which are part of Mexican law but not necessarily inherent in our law. Is that correct, if you know?

Mr. ARENA. Excuse me, Mr. Chairman. Convicted where, in Mexico?

Senator KERRY. In Mexico.

Mr. ARENA. It is my understanding, Mr. Chairman, that there are Mexican proceedings going on both in the Federal District and in Guadalajara, both state and federal Mexican proceedings, which have admittedly been going on for an awfully long time, but Mexican procedure is different.

It is my understanding that these proceedings have not yet closed because of procedural requirements which allow, and they seem a bit strange to us with a common law background; but that

the defense is entitled to a certain number of days to file responsive pleadings based literally on the volume of paper which is presented by the prosecution.

As there are some 50 defendants in those state and federal proceedings, that time has gotten to be pretty extensive for the defense to take advantage.

As Mr. Richard said, earlier, you know, we too have intelocutory appeals, hebeas corpus relief, et cetera. The defendants have been using Mexican equivalents of that to try to delay proceedings.

To specifically respond, I am aware, nor is my office, of no lack of evidence needed by Mexico from the United States which is a fundamental reason for delay in bringing the Camerena-related proceedings to conclusion in Mexico.

Senator KERRY. Lack of U.S. evidence; what is the reason for that?

Mr. ARENA. No, I said I am aware of none.

Senator KERRY. Oh, you are aware of none. I was not, either.

My question really is whether or not you think that Caro Quintero could be extradited to the United States and then the MLAT could be used in order to gain some of the evidence so that we could prosecute?

Mr. ARENA. I think, Senator, it is very unlikely that Caro Quintero would be extradited to the United States for several reasons under the existing extradition treaty.

By the terms of the bilateral extradition treaty with Mexico and Mexican domestic law, extradition of a Mexican is only done in the most unusual circumstances, albeit the murder of a DEA agent in our view would be that, it is highly unlikely, and I am speculating, but they would be unlikely to do it.

The second problem is the non bis in idem concept, the international law equivalent of double jeopardy. Again not to speculate, but it would not be unlikely that an extradition request would be denied on the basis that he had already been tried and either convicted or acquitted for essentially the same crime.

Even though we would analyze it that it is a violation of a different sovereign's law, I think non bis in idem would probably prevent it.

Mrs. MOCHARY. Mr. Chairman, if I may add something.

Senator KERRY. Yes; you have been very silent.

Mrs. MOCHARY. On this question of prosecution going on, if there is an ongoing prosecution in both states there may be a problem in providing evidence to the other state; that is, if we have an ongoing prosecution in the United States and we are requested to provide information which might be implicated in that prosecution, we might deny that request.

Similarly, if we asked for information from another state that had an ongoing prosecution where that information might be implicated, they might deny our request.

So, that this could be a tactic which could be used to frustrate requests under this treaty.

Senator KERRY. What is the process by which this committee—does this committee have the right, for instance, in response to Senator Murkowski's concern about dual criminality, to make an amendment and then you have to go back and negotiate as per any

treaty? Is that the same in terms of reservations, statements, amendment et cetera?

Mrs. MOCHARY. If you wanted to change the treaty, we would have to go back and renegotiate.

Senator KERRY. You would have to go back and seek agreement and renegotiate. It is the same as the process on any other treaty, then?

Mrs. MOCHARY. Right.

Senator KERRY. Exactly. I just want to make sure we are on the same borderline here.

Are you currently in the midst of negotiating other MLAT's at this moment?

Mr. RICHARD. Yes.

Senator KERRY. How many?

Mrs. MOCHARY. IN different stages, the Federal Republic of Germany; Jamaica; we are about to start with the United Kingdom.

Senator KERRY. When do you think we could expect any further MLAT's before the committee?

Mrs. MOCHARY. Not for 6 months at least.

Senator KERRY. Do you have the resources necessary to negotiate as rapidly as you would like?

Mrs. MOCHARY. No.

Senator KERRY. You do not.

Mrs. MOCHARY. On the other hand, Senator, we have never turned down a request from another county for lack of resources, for lack of manpower; however, we stretch them very—

Senator KERRY. But in terms of your efforts to initiate.

When do you anticipate an effort with respect to Hong Kong?

Mrs. MOCHARY. I was in Hong Kong 2 weeks ago and once again asked the Hong Kong government to look very closely at our proposal to negotiate a Hong Kong MLAT.

They are right now discussing it internally not in terms of an MLAT with us but in terms of their relationship with the commonwealth. They will be getting back to us shortly and telling us if they are interested in proceeding with negotiations.

Senator KERRY. What about Singapore?

Mrs. MOCHARY. We intend to negotiate with them, but nothing has been set.

Senator KERRY. Isle of Man?

Mrs. MOCHARY. That is not a negotiating priority that I have heard of.

Mr. RICHARD. We have what I would regard as very significant step, and that was securing from the United Kingdom a commitment to open negotiations for an MLAT. I would hope that the treaty that emerges from that process would in effect serve as model for much of the commonwealth.

So, I view that as a very significant negotiating session.

Senator KERRY. Senator Murkowski, do you have any further questions?

Senator MURKOWSKI. I have no further questions, Mr. Chairman.

Senator KERRY. I want to thank you very much for taking the time to be with us. These are very important agreements, obviously, and we all hope that they can be of significant assistance in our law enforcement efforts.

I happen to agree with you. I think that while there is some cause to wonder whether they will produce all that we want them to, certainly they do facilitate the process by which we can certainly press cause, press the issue, make the demands.

I think they will assist us as we try to measure certain countries' willingness to cooperate. I will be a benchmark for people's seriousness about dealing with some of these issues and may even help us to stretch the legal systems of some countries that need to move further.

I think there are an awful lot of questions in a certain respect left open them and the potential for challenges and so forth, but the process will probably have to care for that more than we can, I think.

So, I thank you for coming in front of us and helping to move these forward. The chairman was here, as you saw, earlier. He could not stay to ask questions, but I know he will want to try to move these as fast as we can.

So, on that note with the record left open for the submission of further questions and answers in writing, this hearing is adjourned.

[Whereupon, at 11:30 a.m., the hearing was adjourned, subject to the call of the Chair.]

PREPARED STATEMENT OF MARY V. MOCHARY

Mr. Chairman and Members of the Committee, I am pleased to appear before you today to testify in support of six recently negotiated treaties on mutual legal assistance in criminal matters. Five of these treaties are now before the Committee for its consideration: those with The Bahamas, the Kingdom of Belgium, Canada, the United Kingdom concerning the Cayman Islands, and the United Mexican States. The sixth treaty, with Thailand, has been sent by the Secretary of State to the President with the recommendation that it be submitted to the Senate for advice and consent to ratification. It is the Administration's hope that once that Treaty is submitted, the Senate will consider it along with the five others.

These six treaties are part of a series of modern mutual legal assistance treaties being negotiated by the United States to improve our ability to counter international criminal activities more effectively. Similar agreements have already entered into force with Italy, the Netherlands, Switzerland, and Turkey; two other such treaties have been concluded with Colombia and Morocco but have not yet entered into force. In addition, we have concluded executive agreements, directed mainly at providing assistance in narcotics trafficking cases, with a number of foreign governments.

In negotiating these treaties, the Department of State has made clear that it views international cooperation in law enforcement as a matter of particular importance in modern international relations. The Department has emphasized to its negotiating partners that law enforcement concerns are important to all countries, not just the United States. We have stressed that mutual legal assistance treaties can help countries fight back against the enemies within -- narco-traffickers who threaten the stability of well-meaning governments, terrorists who hold the rule of law in contempt, and white-collar criminals who enrich themselves by stealing from honest citizens. They are also important because many of those criminals operate on an international scale, orchestrating illegal activities in the U.S. from foreign countries. Our law enforcement endeavors must reach those who function on this scale.

The fruits of our negotiating efforts are before you today. The treaties will not require implementing legislation in the United States, but some of them will require the other

party to adopt such legislation. I would like to give you a brief overview of the provisions common to all six of the treaties under discussion.

A mutual legal assistance treaty (MLAT) is intended to enable law enforcement authorities to obtain evidence abroad in a form admissible in our courts. An MLAT thus supplements existing international arrangements on exchange of information, such as Interpol, as well as letters rogatory. Letters rogatory are written requests from a court in one country to a court in another country for assistance in obtaining evidence. Letters rogatory tend to be a slow and relatively inefficient mechanism because the requests must pass through a number of bureaucratic steps, including courts in both countries, foreign ministries, justice ministries, and in some cases embassies. This takes time -- which, in many criminal investigations and prosecutions, is a rare and valuable commodity.

MLATs, by contrast, allow requests to move directly from one law enforcement agency to another. To facilitate assistance, the treaties establish a so-called "Central

Authority" in each country to process requests for assistance. On the U.S. side, that means the Office of International Affairs in the Criminal Division of the Department of Justice; on the foreign side, the Central Authority is typically the counterpart office or agency. This mechanism for direct contact between law enforcement agencies should greatly expedite requests for assistance.

In addition, the MLATs obligate the parties to provide assistance upon request, with certain exceptions, as when the request relates to a political or military offense. Execution of letters rogatory, on the other hand, is purely a matter of comity.

The MLATs provide for a wide variety of assistance: service of documents, provision of records, locating persons, taking the testimony or statements of persons, production of documents, execution of requests for search and seizure, forfeiture of criminally-obtained assets, and transfer of persons in custody for testimonial purposes. Some types of assistance available under MLATs, such as transfer of persons

in custody for testimonial purposes, are not available under letters rogatory. Moreover, the MLATs require that evidence be provided in a form that makes it admissible in the requesting state's courts.

In practice, MLATs have proven very effective, and over the years there have been numerous instances in which U.S. prosecutorial authorities have obtained valuable assistance through this mechanism. An excellent example is the Badalamenti, or "Pizza Connection," case, which was tried in the Southern District of New York. That trial grew out of the investigation of a number of individuals involved in organized crime, heroin trafficking, and money laundering. Our MLAT with Switzerland provided U.S. authorities with critical bank records and depositions for use at trial. Our MLAT with Italy provided U.S. authorities with additional depositions, recordings of intercepted telephone conversations, and the appearance as witnesses of Italian police officers. Our MLAT with Turkey was used to obtain witness interviews. The trial resulted in seventeen convictions.

I would now like to turn to the six mutual legal assistance treaties under discussion today, beginning with the Treaty with

The Bahamas. Representatives of the United States and Bahamian governments signed a Treaty on Mutual Assistance in Criminal Matters in June and August 1987. In January 1988 the Bahamian government submitted legislation to implement the Treaty to the Bahamian Parliament, which recently approved the legislation.

Like the other mutual legal assistance treaties before the Committee today, the Treaty with The Bahamas establishes Central Authorities to process requests and provides for a wide variety of assistance, including the taking of testimony, provision of documents, execution of requests for searches and seizures, transfer of persons in custody, service of documents, and forfeiture of assets. Perhaps the most useful aspect of the Treaty with The Bahamas is that it will facilitate U.S. efforts to obtain bank records and other evidence of narcotics-related money laundering. In the past, these kind of records have been shielded from U.S. law enforcement authorities by Bahamaian bank secrecy laws.

The Mutual Legal Assistance Treaty with The Bahamas is but one step in a number of recent advances in our bilateral law enforcement relations with that country. In 1987, for example,

expanded joint U.S.-Bahamian interdiction operations resulted in the seizure of 11.3 metric tons of cocaine, representing a 300 percent increase over the amount of cocaine interdicted in 1986. The Bahamas remains the only country in the world that allows the United States to enter its territory in "hot pursuit" of fleeing fugitives. New Bahamian banking regulations have made money laundering more difficult in The Bahamas. And although extradition of fugitives from The Bahamas to the United States has been slowed by the procedural and legal wrangles in the Nigel Bowe case, we have recently extradited two fugitives to The Bahamas under the existing extradition treaty, and we have been negotiating an updated extradition treaty with The Bahamas that we expect to be signed in the near future.

There is little doubt that The Bahamas will remain a significant transshipment point for narcotics for the foreseeable future. This fact only underscores the need for more efficient and effective cooperation in joint law enforcement endeavors. The mutual legal assistance

treaty before the Committee today is a critical element of that improved cooperation.

The Mutual Legal Assistance Treaty with Belgium is one of three bilateral treaties on criminal justice signed by our two countries in the past thirteen months. On March 7, 1987, Attorney General Meese and Minister of Justice Gol signed the Supplementary Treaty on Extradition to Promote the Repression of Terrorism. On April 27, 1987, they signed a new extradition treaty. And on January 28, 1988, in Washington D.C., they signed the Treaty on Mutual Legal Assistance in Criminal Matters.

The Treaty with Belgium provides for the same basic types of assistance as the other mutual legal assistance treaties. It is designed to fit the particular requirements of the Belgian civil law system. The Treaty should be a welcome addition to our existing mutual legal assistance treaties with other countries in Europe, namely Italy, the Netherlands, and Switzerland.

The United States and Canada have a longstanding tradition of close cooperation in law enforcement matters -- a bilateral partnership as productive and cordial as any in the world. The strength of this partnership has recently been reaffirmed by the signing of a Protocol updating our existing extradition treaty in January of this year. Nonetheless, Canadian law has sometimes prevented U.S. authorities from obtaining legal assistance in cases at the pre-indictment, or investigative, stage.

The Treaty with Canada, signed at Quebec City on March 18, 1985, together with its Canadian implementing legislation, will remove the legal barrier to mutual assistance at the pre-indictment stage. The Canadian government has introduced its implementing legislation in the Canadian Parliament, but final action on that legislation has not yet been taken. Once ratified, the Treaty will ease the friction that has sometimes arisen when U.S. authorities have resorted to subpoenas of documents located in Canadian branches of institutions doing business in both countries.

The Treaty with the United Kingdom concerning the Cayman Islands, signed in July 1986, grew out of the Drug Information Agreement signed by the United States and the Cayman Islands in 1984. That Agreement established a means by which the parties can afford one another access to evidence needed in narcotics cases. It also provided that if the parties were satisfied with the Agreement, they would enter into negotiations for a full mutual legal assistance treaty within nine months after the Agreement entered into force.

The Cayman Islands has become a favorite location for money launderers. Like the Treaty with The Bahamas, the Treaty with the Cayman Islands will facilitate U.S. efforts to obtain bank records and other evidence of money laundering and trafficking in illicit narcotics. As in other Caribbean jurisdictions, Cayman bank secrecy laws have in the past hindered U.S. efforts to obtain this type of evidence.

On December 9, 1987, the United States and the United Mexican States signed a Treaty on mutual legal assistance, and on December 29, 1987, Mexico ratified the Treaty, marking the first time that a Latin American country has ratified a mutual

legal assistance treaty with the United States. The Treaty should be a valuable supplement to existing U.S.-Mexican cooperation in law enforcement, drug interdiction, narcotics-related arrests, and opium poppy eradication

Like the other treaties before the Committee today, the Treaty with Mexico authorizes assistance for the prevention, investigation and prosecution of a broad range of offenses, and it does not require that covered offenses be punishable in both countries. It is designed to work within the contours of the Mexican civil law system, and it is flexible enough to encompass changes in Mexican law. The Treaty will not require implementing legislation in either country.

The United States and the Kingdom of Thailand signed a Treaty on mutual legal assistance in March 1986. It is the first such U.S. treaty with an Asian country. Although the Treaty has not yet been formally submitted to the Senate for its advice and consent to ratification, President Reagan is expected to do so shortly. In the meantime, the Thai government is preparing to submit legislation to its parliament implementing the Treaty. No U.S. implementing legislation is required.

Once ratified, the Treaty should help shore up U.S. efforts to stem the flow of illegal narcotics from Southeast Asia to the rest of the world. Thailand's principal role in the international narcotics market is as a conduit for narcotics produced in Burma and Laos, but it also produces significant amounts of opium and marijuana and serves as a pipeline for large sums of money derived from the sale of illegal drugs. By facilitating seizure of evidence, provision of documents and bank records, execution of search requests, and other law enforcement operations, the Treaty will be actively enlisted in the war on narcotics in Thailand and Southeast Asia. The Treaty will supplement continuing U.S.-Thai cooperation on eradication of opium, arrest of drug smugglers, and disruption of the flow of chemicals used in illegal drug production to border refineries.

In conclusion, I should emphasize that the effectiveness of these MLATs will ultimately depend on the parties' commitment to use the treaties aggressively and efficiently. An MLAT accomplishes nothing if left unused. I expect, however, that all six of the treaties under consideration today will quickly be called into active service. I respectfully urge the Senate to give its advice and consent to these treaties at an early date, and I thank the Chairman for allowing me to appear today.

PREPARED STATEMENT OF MARK M. RICHARD

Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on the five mutual legal assistance treaties which have been referred to the Committee -- treaties with Canada, Mexico, the Bahamas, Belgium, and with the United Kingdom concerning the Cayman Islands. My comments will also encompass our treaty with Thailand, which we understand may be submitted soon enough to permit the Committee to consider it along with the other treaties.

The Department of Justice participated with the Department of State in the negotiation of these treaties, and today joins the State Department in urging the Committee to report favorably on the Senate's advice and consent to their ratification.

Treaties designed to obtain evidence from abroad, which are commonly referred to as Mutual Legal Assistance Treaties, or MLATs, are a relatively new phenomenon. The first such treaty was our treaty with Switzerland, which entered into force in 1977. Since that time, MLATs with the Netherlands, Turkey and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step towards agreement on a more expansive mutual assistance treaty.

The negotiation and implementation of effective mutual legal assistance treaties and executive agreements is a very important aspect of our effort to investigate and prosecute serious crime. As this Committee knows all too well, we have in recent years seen the internationalization of serious crimes such as narcotics trafficking, money laundering, terrorism, and large scale fraud. As a result, it has become increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLATs is to provide a reliable and efficient means of obtaining this evidence.

Inasmuch as the Department of Justice has prepared detailed technical analyses of each of the treaties, I would like to speak today in more general terms about why we view treaties such as those now before the Committee as important instruments in effectively investigating and prosecuting serious offenses.

At the same time, it is important to note that these treaties are not panaceas. They will not resolve the problem of international crime, though they can be an extremely useful tool to that end. Moreover, how effective an MLAT ultimately proves to be depends as much on the good faith and commitment of the parties as it does the specific language of the instrument. It also requires that the parties have a frank and productive working relationship in implementing the treaty. Indeed, we have

come to view this process of consultation as so important to the effectiveness of our MLATs that we now seek to include specific consultation provisions in the texts of our treaties.

For the benefit of the members of the Committee, I would now like to briefly explain what an MLAT is and what we see as its primary advantages.

An MLAT generally can substitute for the use of letters rogatory in criminal cases. Letters rogatory are written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance needed in a judicial proceeding. Letters rogatory are used in both civil and criminal cases. Because we presently have only a small number of mutual legal assistance treaties and executive agreements in force, in the absence of an MLAT we use letters rogatory to obtain evidence when dealing with foreign countries.

However, MLATs provide, from our perspective, a much more effective means of obtaining evidence. First, an MLAT <u>obligates</u> each country to provide evidence and other forms of assistance needed in criminal cases. Letters rogatory, on the other hand, are executed solely as a matter of comity, more often than not by the judicial branch of the requested government.

Second, an MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale criminal activity such as narcotics trafficking and white collar crime.

Third, in an MLAT we have the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include, for example, the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. The rules of evidence that govern admissibility in our courts and even such basic aspects of our legal system as the opportunity for probing cross-examination of witnesses by defense counsel are, in large measure, unheard of in the majority of countries which have civil, rather than common law, legal systems. MLATs can establish a procedural framework for ensuring that the evidence we obtain will comport with our evidentiary requirements and be admissible at trial.

Fourth, our MLATs are structured to streamline and make more effective the process of obtaining evidence. Each of our MLATs provides for a Central Authority which is responsible for making and executing requests under the treaty. In effect, the Central Authorities are the Justice Departments of the two countries, and

they deal directly with one another on all treaty matters. For the United States, the treaties also always provide that the Central Authority can actually formulate the request for assistance. This means that all treaty requests may be made by the Department of Justice. Court-issued letters rogatory are consistent with the judicial conduct of criminal investigations in most civil law countries. This practice is, however, something of an anomaly in the United States where the investigation and prosecution of crimes is a function of the executive, rather than judicial, branch.

Comparing the way in which letters rogatory and treaty requests are made illustrates the virtues of treaty procedures. In the case of letters rogatory, an Assistant United States Attorney must apply to the district court for the issuance of letters rogatory and file a set of pleadings, including proposed letters rogatory. Once signed by the court, the letters rogatory must then be presented through diplomatic channels. This means it goes from the prosecutor to the Department of Justice, to the Department of State, to the appropriate U.S. Embassy, to the Ministry of Foreign Affairs, to the Ministry of Justice, and finally to the court which will execute it. This process requires the preparation of various letters of transmittal and instruction, cables, and diplomatic notes. The evidence obtained through the letters rogatory is then transmitted back to the requesting prosecutor through the same tortuous route.

The process for treaty requests is quite different. By regulation, the Attorney General has delegated his powers as Central Authority to the Criminal Division's Office of International Affairs. The prosecutor or investigating agent seeking the evidence works directly with the Office of International Affairs in preparing the request, and it is signed by the Director of that Office. The request is then sent directly to the Central Authority of the treaty partner, which will either execute the request, or refer it to the appropriate court or law enforcement agency for execution. The route for the return of the evidence is the same.

While each of the treaties now before the Committee shares the characteristics and goals I have outlined, the specific provisions of the treaties may vary. In some cases, the differences are semantic; in others they are substantive. But having certain substantive differences among the treaties is the inevitable result of bilateral negotiations over a period of years with six countries which have differing legal systems and domestic interests, and with which the United States has differing law enforcement relations and priorities.

The treaties before the Committee are, in part, a reflection of our present and past law enforcement relations and priorities with our treaty partners. For example, there is no country with which we have more extensive or more productive law enforcement cooperation than with Canada. With this foundation and the

advantage of a shared legal tradition, we expect our MLAT with Canada to be our most frequently and most effectively used treaty. On the other hand, we would be naive to expect that the MLAT with Mexico, which shares our southern border, could be as easily utilized. Mexico has a very different legal system, and those differences have shaped the language of the treaty as has our history of relations in the law enforcement arena. Moreover, Mexico has special sensitivities with respect to issues perceived to impact on its sovereignty.

Our priorities in combatting narcotics trafficking and money laundering contributed to our efforts to negotiate viable MLATs with the Cayman Islands, the Bahamas, Mexico and Thailand. In the case of Canada and Mexico, our shared borders and the resultant volume of criminal cases requiring bilateral cooperation were important factors. With Belgium, we had an opportunity to negotiate, in a rather short period, an MLAT with a European country that is major commercial and financial center, and in doing so, to set the stage for MLAT negotiations with neighboring countries with legal systems quite similar to those of Belgium.

From our experience with the treaties now in force, we have learned that MLATs can be an extremely valuable tool in obtaining the evidence we need to successfully prosecute major crimes. In the ten years since our treaty with Switzerland entered into force, we have refined certain of our positions on the many

issues that may arise in negotiating an MLAT, and we at the Department of Justice have learned much in the process of implementing our treaties.

The treaties before the Committee, like the MLATs now in force, represent an evolution in our positions in the mutual assistance field. Each treaty, too, is the product of a unique negotiating history. None is a perfect instrument. Thus, each MLAT is different from the next, and each is a complex instrument and reflect the peculiarities of our own and our treaty partner's laws and procedures.

Accordingly, we appreciate the considerable task the Committee faces in analyzing these MLATs. I would be pleased to respond to the Committee's questions, including any written questions the Committee may wish to pose after the hearing today.

JOINT RESPONSES OF DEPARTMENT OF JUSTICE AND DEPARTMENT OF STATE
TO QUESTIONS ASKED BY SENATOR KERRY

GENERAL

Q: 1. Objectives: For the record, could you provide for the six treaties pending before the Committee: (1) the reason for the selection of each country; (2) the objective sought by the U.S. negotiators; and (3) any concessions made by the U.S. to achieve each agreement?

A: (1) In general, our negotiating priorities reflect United States Government law enforcement agencies' needs as well as our foreign policy interests, the views of our treaty partners regarding the need and desirability of initiating negotiations, and the likelihood of obtaining a treaty which meets the law enforcement needs of the United States. When negotiating MLATS, one of our principal goals is to ensure that a broad range of offenses will be covered; we are particularly concerned that modern narcotics-related offenses, such as RICO, CCE, and money laundering, and white collar crimes including tax offenses are covered. At the time the decisions were made to initiate negotiations (and later, to conclude the treaties) with the six specific countries in question here, each was considered a priority in light of these criteria.

(2) The overall objective for all MLATs is closer, more effective law enforcement cooperation and the availability of admissible evidence in high-priority criminal investigations and prosecutions. We have different law enforcement priorities with different treaty

partners. For example, bank secrecy laws were a particular concern when we negotiated the treaties with the Bahamas, the Cayman Islands and Belgium. With Mexico, law enforcement priorities included obtaining witness testimony and documentary and other evidence.

In addition, these treaties were negotiated over a period of years. When the Thai and Canadian treaties were negotiated in the early 1980s, we (particularly the Department of Justice) had had some experience in implementing the existing MLATs (i.e, with Switzerland, Italy, Turkey and the Netherlands) and thus were able to refine our objectives; since then, additional experience and changes in U.S. domestic law have led to further modifications in our negotiating proposals. For example, all of these treaties contain provisions which will enable us to implement the recently enacted U.S. law, 18 USC 981(i)(1), providing for the transfer of an equitable share of certain forfeited property to other countries.

(3) Negotiation of an MLAT necessarily involves some degree of compromise on both sides, reflecting different law enforcement priorities as well as differences in the parties' respective legal systems. For example, the Mexico MLAT does not require dual criminality to create an obligation to assist (unlike the Caymans and Bahamas MLATs which require dual criminality except for limited categories

of offenses), so that assistance can be provided in the broadest range of matters, including for example tax offenses. Accordingly, the U.S. negotiators were prepared to compromise on provisions regarding the compelling of testimony or documents to take into account the requirements of current Mexican law. Each treaty has at least one provision which, by comparison to one of the others, might be considered less than optimal from a purely technical perspective. In none of the treaties, however, were we required to make concessions that would undercut the utility or effective functioning of the treaty mechanism.

Q: 2. Effectiveness of Existing Options: Why are the alternative options of letters rogatory, depositions and subpoenas ineffective? Will the U.S. courts still have these alternative methods available to them after we ratify these treaties?

A: Letters rogatory tend to be a slow and relatively inefficient mechanism because the requests must go through a series of time-consuming steps in the courts in both countries, foreign ministries, justice ministries, and, in some cases, embassies. MLATs, by contrast, allow requests to move directly between the "Central Authorities" established in each country for this purpose.

Existing mechanisms for assistance have sometimes proven inadequate because foreign law often forbids such assistance at the pre-indictment, or investigative, stage of

the law enforcement process. MLATs provide for assistance in the investigation and prevention of crimes, not just in the prosecution of crimes.

Extraterritorial enforcement of subpoenas by U.S. authorities has sometimes led other nations to complain of infringements on their sovereignty. For example, our relations with Canada and the United Kingdom, among others, have on occasion been strained as a result of U.S. subpoenas of documents located outside the U.S. in the possession of institutions doing business in both countries. The MLATs will ease such friction by providing a mechanism for assistance relating to compulsory process.

The traditional means of obtaining evidence abroad will remain available to U.S. courts and litigants. The MLATs supplement those methods; they do not replace them altogether. Moreover, the MLATs typically provide that the parties may grant assistance in accordance with existing international arrangements, such as Interpol, or in accordance with other international agreements or practices that may be applicable.

Q: 3. Relationship of MLATs to Extradition Treaties:

-- How do the recently-negotiated extradition treaties with Mexico, Thailand and Belgium deal with extradition of drug offenders?

A: The new extradition treaties with Belgium and Thailand have not yet taken effect; once ratified they will allow extradition of drug offenders. They do not require extradition of nationals, however, because of insurmountable obstacles in the domestic law of those countries.

The United States and Mexico entered into a modern extradition treaty on January 25, 1980. That treaty covers a broad range of narcotics offenses, including conspiracy and participation offenses. While it does not require the extradition of nationals, it does provide that if extradition is not granted on the basis of nationality, the requested party shall submit the case to its competent authorities for the purpose of prosecution. Mexican law prohibits the extradition of Mexican nationals except in "extraordinary circumstances."

The Mexican government has returned a number of non-Mexican narcotics traffickers to the United States pursuant to their domestic legal authorities and has prosecuted locally a number of fugitives for violent crimes. While the United States has not yet made many formal requests for extradition from Mexico or obtained the return of any fugitives to the United States under the new extradition treaty, we presently are working with the Mexicans to make

the extradition treaty an effective vehicle for pursuing fugitives.

For the record, Mexico did return one fugitive to the United States under the predecessor extradition treaty -- a Mr. Flato in 1961 for fraud offenses.

At the February meeting between President Reagan and President de la Madrid, President Reagan emphasized the importance of successful implementation of the new extradition treaty by the Mexicans. We have extradition requests pending with the Mexican government, including one for narcotrafficker Veronica Kiera-Wahl, and are working for favorable decisions in those cases.

Q: -- What is the status of our extradition treaties with the Bahamas, the Cayman Islands, and Canada?

A: Our extradition relations with The Bahamas are governed by the 1931 U.S.-U.K. Extradition Treaty (which covers a number of former British dependencies). Within the past few weeks we have used that Treaty to extradite two fugitives to The Bahamas, and it has been used in the past to extradite several Bahamian fugitives to the United States. Unfortunately, the legal and procedural wrangles in the Nigel Bowe extradition case have slowed other pending requests for extradition from The Bahamas. Although the Bowe proceedings have been protracted and complex, the U.S.

Government is continuing its efforts to extradite Bowe to the United States to bring him to justice and to unblock the other extradition requests.

Our existing Treaty with Canada has proved very useful. Fugitives are routinely extradited in each direction.

Our 1972 Extradition Treaty with the United Kingdom also covers the Cayman Islands. Although we have had comparatively few extradition cases involving the Caymans, we have had extensive experience with the 1972 U.S.-U.K. Treaty, and it has proved to be very useful in extraditions to and from jurisdictions including the Cayman Islands.

Q: -- How has the Single Convention worked in efforts to extradite drug traffickers? What advantages does a bilateral treaty have for us?

A: From the U.S. perspective, a bilateral treaty is essential, not merely advantageous. U.S. law forbids the extradition of a fugitive in the absence of an extradition treaty, and our analysis suggests that multilateral conventions do not satisfy this requirement even if they contain extradition provisions. Our law does not forbid us to make requests in the absence of a bilateral treaty, but generally such requests -- known as requests for extradition "as a matter of comity" -- are unsuccessful, since we must make clear to

the requested state that we would not be able to reciprocate.

The Single Convention, however, has been very useful to supplement old bilateral extradition treaties which do not require the extradition of drug offenders. For instance, our current extradition treaty with Costa Rica which was negotiated at the turn of the century does not cover drug offenses. Nevertheless, because both the U.S. and Costa Rica are parties to the Single Convention on Narcotics of 1961 and its 1972 Protocol, we have obtained the extradition of more than 20 drug offenders from Costa Rica since 1982.

Q: -- How do we overcome, or seek to deal, with the obstacle of other countries' constitutional or statutory prohibitions against extraditing their own nationals?

A: Obviously, we must do our best to convince such countries that it is in their interests, as well as ours, to permit the extradition of nationals for serious crimes committed abroad.

In a given case, when a country refuses to extradite one of its nationals to us, we must decide whether to wait to see whether the offender will travel outside the country of refuge or to try to convince that country to prosecute the offender there. Generally, when negotiating extradition treaties with such countries, we include a provision

requiring that such cases be submitted to the prosecutorial authorities, upon request of the United States.

Q: 4. Delays:

A: [Answered during hearing.]

Q: 5. Bilateral vs. Multilateral Approaches: What multilateral instruments designed to further extradition and law enforcement relations with other countries are in effect, or underway?

A: The United States is party to a number of multilateral agreements on law enforcement matters now in effect, including the Single Convention on Narcotics of 1961 and its 1972 Protocol, the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the Hague Convention on the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, the International Convention Against the Taking of Hostages, the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, and the Convention on the Physical Protection of Nuclear Material. With the exception of the Tokyo

Convention, these treaties all create an obligation to extradite or submit for prosecution alleged offenders found in the territory of a State Party.

The United States is participating actively in the negotiation of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which if successfully concluded is expected to improve multilateral efforts to counter the flow of illegal narcotics around the world. The United States also participated actively in the negotiation of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, which was negotiated under the auspices of the International Maritime Organization and was concluded last month in Rome.

Q: 6. Bank Secrecy: Will these treaties in any way assist U.S. law enforcement agencies and courts to pierce the bank secrecy veils of the Cayman Islands and the Bahamas?

A: Both the Cayman and Bahamas MLATs are expected to materially assist United States law enforcement agencies in piercing foreign bank secrecy laws in connection with criminal investigations.

Q: -- Did the U.S. make an effort to breach the existing bank secrecy laws in the course of negotiating the treaty with the Bahamas? What was the response of the Bahamian government? How important is the problem of Bahamian bank secrecy to the United States law enforcement efforts?

A: During the negotiations, the United States delegation stressed that problems are posed for United States law enforcement by drug traffickers and others who utilize Bahamian banks because the Bahamian Bank and Trust Companies Regulation Act, 1965 shields records of transactions from United States investigators. Although Bahamian courts have executed letters rogatory from the United States seeking such records, the problem remains a serious one for U.S. law enforcement because the process is too slow, expensive and cumbersome to accommodate the volume of cases and investigations. The Bahamian delegation forthrightly recognized the problem, and both delegations agreed that if the treaty is implemented in good faith it will significantly discourage the abuse of Bahamian bank secrecy.

Q: -- Is there a bank secrecy problem in Canada? Will U.S. authorities be able to get access to Canadian bank records when they are required in a criminal case?

A: Our problem with Canada has not concerned bank secrecy so much as Canadian law, primarily Section 43 of the Canada Evidence Act, which prevented Canada from rendering assistance when the case was at the investigative stage. When ratified, the Treaty, together with the Canadian implementing legislation when adopted, will remove the legal

barrier and permit (indeed, obligate) Canada to provide bank records in cases even prior to indictment.

Q: -- Are you convinced that the agreement with the United Kingdom covering the Cayman islands will end the use of the Caymans as a money laundering center?

A: As indicated during the hearing, we do not believe that any single treaty will totally end the efforts of criminals to launder money in the Caymans. However, we believe that if this treaty enters into force and is implemented in good faith it will provide a valuable tool for obtaining the evidence needed to prosecute these offenders.

Q. 7. U.S. Organization. How is the U.S. organized to process the requests for information permitted by these treaties? How will this work in a technical sense? What is the case load of the Office of International Affairs? What percentage of the cases, those involving requests to obtain evidence from abroad, as well as requests from abroad, involve narcotics prosecutions?

A. The U.S. organization for the processing of MLAT requests is as follows: The Attorney General is the Central Authority for the United States under all United States mutual legal assistance treaties. The Attorney General has delegated his duties as Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R. 0.64.1. The Assistant Attorney General for the Criminal Division has in turn redelegated his authority to the Deputy Assistant Attorneys

General and the Director of the Criminal Division's Office of International Affairs (OIA), in accordance with the regulation. Directive No. 81, 44 FR 18661, March 29, 1979, as amended at 45 FR 6541, January 29, 1980; 48 FR 54595, December 6, 1983.

As a practical matter, OIA handles all U.S. MLAT requests, outgoing and incoming. OIA's attorneys work with U.S. prosecutors who need foreign evidence to formulate a request in the form required by the appropriate treaty. Once the prosecutor has finished the request, it is translated (if necessary) and reviewed by OIA's attorneys and signed by OIA's Director. OIA then transmits it to the other country's Central Authority, by telefax, international courier, or through Interpol.

The Office is also charged with receiving and seeing to the execution of incoming requests from foreign countries for investigative or evidence gathering assistance in the United States.

Under all of these treaties, as well as those currently in force, the Office consults with appropriate officials in the Departments of Justice and State, as well as officials in other agencies as necessary, when required to make discretionary determinations under the treaties in novel, unusual, or sensitive situations.

The Office currently has approximately 1150 mutual assistance matters pending at this time.[1] These requests are handled by the current staff of fourteen attorneys in the Office of International Affairs. If the cases were divided equally, each attorney would carry a case load of approximately 84 mutual assistance matters.[2]

A statistical study of the cases[3] in the Office of International Affairs in late 1986 showed that approximately 37% of the federal cases worked on by the Office involved narcotics offenses; 19% of the foreign requests involved narcotics; and 10% of the requests for assistance by the states of the United States involved narcotics offenses.

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1 The term "matter" denotes both treaty requests and letters rogatory requests which have been made and for which the Office is awaiting a response. It also includes requests from prosecutors and investigators for advice and other assistance in particular cases, even though a formal request for assistance has yet to be made.

2 The cases are not divided equally among the attorneys in the Office. The Office also has an extradition case load of approximately 1,200 pending cases. Some of the attorneys have more extradition cases than mutual assistance; others, handle more mutual assistance work.

3 The study at that time relied primarily on statistics from extradition cases. It is believed, however, that a study focussing only on the mutual assistance work would reveal percentages very similar to those found in the 1986 study.

Q: 8. Political Exception: Five of the pending treaties include a political offense exception. Did each of the five governments insist on inclusion of this provision? Do you view this as a serious loophole in each of these treaties?

A: "Political offense" exceptions are included in a number of our MLATs, including all of the treaties now pending before the Senate except for Canada. The exceptions generally provide that assistance may be denied by the Requested State if the request relates to a "political offense." These provisions permit the Requested State either to deny assistance in covered circumstances or, in the alternative, to impose limitations on the provision of assistance.

In MLATs where no express "political offense" exception is included, the United States delegations believed that, in those few cases where it would be necessary to deny assistance because of fundamental tenets of American jurisprudence, including in certain instances concerns about the political nature of an offense, the separate "fundamental public interest" exception to assistance could be invoked; therefore, we saw no need for inclusion of a specific "political offense" limitation. The particular "political offense" exception language in each treaty was included at the request of our negotiating partners, typically for reasons of precedence and domestic political concerns. We do not view the provision as a serious

loophole; in no case is denial of assistance required because of this provision; rather, it is a discretionary basis for refusing assistance. Further, we expect it to be narrowly interpreted and rarely invoked to deny our requests for assistance.

Q: 9. General: Why are there so few mutual legal assistance treaties in place? Is the problem a lack of resources? Is the issue one of priorities? How long has it taken to negotiate these treaties?

A: Mutual legal assistance treaties are a relatively new and innovative law enforcement tool. Our first MLAT, with Switzerland, was signed in 1973 and entered into force in 1977. Since then we have signed MLATs with Turkey (1979), Columbia (1980), the Netherlands (1981), Italy (1982) and Morocco (1983), as well as those now before the Senate. These treaties are a response to recent developments in criminal activity. The exponential increase in transnational crime has resulted in a parallel increase in the usefulness of MLATs in combatting transborder offenses, particularly narcotics and related offenses and certain types of white collar crime (for example securities offenses) and in promoting international judicial cooperation.

Because other countries have law enforcement mechanisms and legal systems very different from those of

the U.S., the process of reaching an understanding as to how our countries can cooperate most effectively in criminal matters is often lengthy. Because of the legal importance of the technical provisions of an MLAT, both parties need to make sure that they have thoroughly understood all aspects of the agreement and will be able to implement them successfully in specific criminal investigations and prosecutions. Articulating the precise contours of the obligation to assist in criminal matters is a complex and necessarily time-consuming process.

Moreover, the timing of negotiations is not entirely within the control of the United States. Our negotiating partners also need time to consult, coordinate and reach agreement internally about the provisions of the treaty. Not surprisingly, the six Treaties under consideration all took months and sometimes years to negotiate. However, as we and other countries have gained negotiating experience in this area, and as the concept of formal MLAT agreements has gained international acceptance, we expect the process to become less time-consuming.

Q: -- Is there implementing legislation in place in each of the countries which has signed a treaty that you have submitted for ratification? What is the nature of the implementing legislation that these treaties require? Is implementing legislation required in the United States?

A: Whether implementing legislation is required depends entirely on the domestic legal system of our treaty partners. Implementing legislation was adopted in 1986 in the Cayman Islands and has received legislative approval in The Bahamas; all that is now required for the legislation to become effective is the signature of the Governor General. In Canada, draft legislation is currently under review in the Parliament and should be adopted shortly. Thailand is still in the process of drafting its implementing legislation. No implementing legislation is necessary in Mexico or Belgium.

No U.S. implementing legislation is necessary. The treaties are self-executing and implicate existing statutory authority, in particular 28 U.S.C. 1782.

Q: -- Are there differences in these treaties based on differences in the legal system in the signatory countries? What differences would there be as between common law and civil law jurisdictions?

A: In some respects, each of the treaties reflects differences between our legal systems and those of our respective treaty partners. For example, in the treaties with Belgium and Mexico, the articles providing for the taking of involuntary witness statements reflect the fact that, under the civil law systems in those countries, the witness may not be directly questioned by attorneys since interrogation is the

prerogative of the investigating judge in Belgium or the prosecutor or trial judge in Mexico. To ensure that evidence obtained in this manner would still be admissible in U.S. courts, however, provision had to be made to ensure sufficient opportunity for cross-examination and right of confrontation to satisfy U.S. constitutional standards. Similarly, the provisions on taking testimony in the Requested State are designed toá accommodate the Requested State's laws on immunity, which vary from one country to the next, as well as possible assertions of testimonial privilege under the Requesting State's laws.

Q: 10. Corruption:

A: [Answered during hearing.]

Q: 11. Limitations on Compliance--"Public Interest": How is the term "public interest" construed in each of these treaties? Does each of the four MLATs in force contain a similar "escape clause?" What has been the experience with each of these countries in denying requests based on the "public interest" exception?

A: These provisions were included to ensure that neither party would have an obligation to provide assistance when doing so would be detrimental to its fundamental interests, for example, when providing assistance would seriously damage its basic institutions, violate its fundamental principles of justice or threaten its security. Protecting national

security and ancillary interests could be used to deny a request; for example, there is no obligation to provide information which is properly classified for national security reasons or which would expose individuals (such as confidential informants) to death or physical harm. It is our hope and intent that these provisions will be narrowly interpreted; certainly that is how we will read them.

Each of the four MLATs now in force contains a provision allowing denial of requests if their execution would be contrary to the Requested State's "essential public interest." See Art. 3 of the Swiss Treaty; Art. 22 of the Turkish Treaty; Art. 10 of the Netherlands Treaty; and Art. 5 of the Italian Treaty. We are aware of no case in which any of these four countries have refused an MLAT request on this basis.

Q: 12. Problems with Earlier Treaties: Why haven't Colombia and Morocco ratified their MLATs with the United States? What are their problems with these treaties?

A: Although the U.S. Senate gave advice and consent to the treaty with Colombia in 1982 and to the treaty with Morocco in 1985, neither Morocco nor Colombia have yet ratified. In recent years we have focused our attention on implementing the extradition treaty with Colombia and other aspects of our bilateral law enforcement relations. In that context we have discussed the advisability of pursuing the ratification

of the treaty with Colombia. With respect to Morocco, although we are disappointed that the Moroccans have not yet ratified the Treaty and hope that they will ratify the Treaty shortly, we are pleased to note that we have obtained substantial assistance in criminal matters from the Moroccans in a number of matters even without a treaty obligation to do so. Nonetheless, we continue to raise our interest in the treaty at appropriate occasions with Moroccan officials.

Q: 13. Future Treaties:

A: [Answered during hearing.]

Q: 14. Disincentives for Future Agreements: Some of these MLATs deal only with narcotic-related crime or specifically exclude tax-related crimes. Will the ratification of such agreements remove incentives for these nations to enter into cooperation agreements dealing with tax or other non-narcotics related crimes?

A: On the contrary, none of the MLATs deals exclusively with narcotic-related crimes, although such crimes have in fact been a high law enforcement priority with respect to the countries in question and a principal motivation for concluding the mutual legal assistance treaties. Each MLAT covers a broad spectrum of offenses, including most felonies. It is true that the Caymanian and Bahamian treaties exclude certain tax or tax-related offenses; this

was at the insistence of the Caymanian and Bahamian negotiators. In those (and some other) countries, tax offenses are dealt with differently from other criminal conduct and therefore are considered inappropriate matters for mutual legal assistance; as indicated by the technical analyses made available to Committee staff, to an extent this attitude reflects a traditional view of customary international law which has not yet been disregarded. We do not believe ratification of the MLATs will in any way reduce any incentives for such states to enter into agreements for the exchange of information concerning tax offenses (as the Committee is aware, the U.S. has an active tax treaty program) or other non-narcotics offenses. Rather, we would expect that positive experience under the MLATs would encourage prosecutorial authorities to seek additional information sharing arrangements.

CAYMAN ISLANDS

Q: 1. Burden of Proof. Under this treaty, the U.S. is required to establish "reasonable grounds" for believing that both the specified crime has been committed, and the information requested is located in the territory of the Requested State. What are the standards for establishing "reasonable grounds"? Why was this condition included in this treaty? How onerous will this standard be?

A: The "reasonable grounds" standard was included because the Cayman and United Kingdom delegations felt strongly that

under the MLAT they should have the right to deny assistance if the investigation in the Requesting State is a mere "fishing expedition" with no real substance. Since none of our previous MLATs or executive agreements has this precise provision, we cannot say how onerous it will prove to be until the treaty enters into force and we begin implementation, but we do not expect it to pose a major obstacle if the treaty is implemented by all parties in good faith.

Q: 2. Use of Domestic Subpoenas. The Cayman Islands has been concerned about the extraterritorial reach of American courts through the use of subpoenas. U.S. courts have successfully subpoenaed a Cayman Island bank official while he was visiting the U.S.; subpoenaed attorneys and agents for a foreign corporation; and subpoenaed the Miami branch of a Canadian bank for records maintained in the bank's Cayman branch. Will this treaty prohibit the use of such subpoenas within the U.S. in the future? If so, why did the U.S. agree to such a provision?

A: Nothing in the Treaty bars the United States from serving such subpoenas. However, Article 17 does prohibit the United States from enforcing "any compulsory measure, including a grand jury subpoena, for the production of documents located in the territory of the [Caymans] with respect to any criminal offense within the scope of this Treaty" unless the United States has first made a request

for assistance, notified the Cayman Central Authority that delay or denial of the request would jeopardize our investigation, then accorded the Cayman Islands time to act on the request. The United States agreed to the provision because both the Cayman and United Kingdom delegations insisted that the Treaty contain such a provision. The intention of the parties was that in return for the United Kingdom and the Caymans' obligation to produce evidence in connection with our cases, the United States would utilize the treaty as an avenue of first resort in cases where it is applicable, rather than immediately employ subpoenas. In this manner, the Treaty would substitute international cooperation for the international tension generated by the differences in view between the United States and the United Kingdom on the propriety of such subpoenas. It should also be noted that prior to the negotiation of the Cayman MLAT, the U.S. entered into a 1984 executive agreement with the United Kingdom on U.S. access to Cayman Islands documentary evidence in narcotics cases. That agreement contained a similar provision on the enforcement of U.S. subpoenas, and despite our initial reluctance to agree to such a restriction, we found that in practice it has not in fact proven to be a problem.

Q: 3. Law Enforcement Projects. The IRS in a project called "Project Pirate" induced a Caymanian police official to come

to the U.S. and reveal information in violation of Caymanian law. Would this treaty prohibit the IRS from conducting such projects in the future? If so, why?

A: Nothing in the Cayman MLAT directly addresses law enforcement projects of this kind. However, we anticipate that the treaty will have a tendency to discourage such projects in the future in direct proportion to the extent that the treaty proves to be an effective mechanism for U.S. prosecutors and investigators to obtain needed information from the Cayman Islands without having to resort to such imaginative approaches.

Q: 4. Bank Secrecy. In 1964, the Cayman Islands had two banks and no offshore business. In 1981, the Caymans had 360 branches of U.S. and foreign banks and over 8,000 registered. companies. It is suspected that the Caymans' secrecy laws are being utilized by criminals to launder their proceeds. Will this treaty address this problem? If not, why?

A: [Answered during hearing.]

Q: 5. Comparison with Former Agreement. This treaty will replace an existing (1984) executive agreement which has proven to be very useful to law enforcement officials. What are the differences between this treaty and the 1984 executive agreement? What advantages de we gain under the treaty? What advantages under the 1984 executive agreement de we lose?

A: The treaty and the executive agreement differ in basically four areas. First, the executive agreement is non-reciprocal such that the U.S. can obtain assistance from the

Cayman Islands, but the Cayman Islands cannot obtain assistance from the U.S. The treaty is reciprocal.

Second, this treaty is much broader with regard to scope of covered offenses than is the executive agreement. The treaty covers any activity punishable by more than one year's imprisonment under the law of both the Requesting and Requested Parties and any activity (whether punishable in both countries or not) which constitutes racketeering, drug trafficking, fraud in connection with tax shelters, tax evasion or filing false statements with respect to illegally obtained income, failing to report transfers of illegally acquired money, insider trading in securities, fraudulent securities practices, violations of the Foreign Corrupt Practices Act (15 U.S.C. 78 (Supp. II 1978)), or participation in any of these crimes. The executive agreement is limited to investigations and prosecutions involving drug trafficking.

Third, the executive agreement is also more limited with regard to the types of assistance available. It is limited to production of documents and records, together with provision of foundation testimony, authentication, and certification necessary for those documents and records to be admissible in court in the United States. The treaty, provides in Article 1 that assistance is to include, among other things, the taking of testimony or statements of

persons, serving documents, locating persons, transferring persons in custody for testimony, executing requests for searches and seizures, and assistance with regard to immobilizing criminally obtained assets, forfeiture, restitution, and collection of fines procedures, as well as the types of assistance available under the executive agreement.

Fourth, the procedures for requesting assistance differ considerably. The executive agreement requires that the request take the form of a certificate from the Attorney General of the United States specifying what documents and records are needed. The treaty requires in Article 4(2) that the request for assistance disclose information concerning the agency conducting the investigation and describe "the subject matter and nature of the investigation or proceeding. . . and in particular the criminal offense or offenses for the investigation, prosecution or suppression of which the assistance is requested."

Under the treaty the U.S. will be able to obtain a wider variety of kinds of offenses for use in a greater variety of investigations and prosecutions. The executive agreement, however, is more to our advantage than the treaty with regard to the information we must disclose in order to obtain assistance, and, perhaps, the speed with which the requests are to be executed. Moreover, the executive

agreement is a "known quantity" in that it has been in force for four years during which its implementation has been refined and clarified. For these reasons, we intend to discuss with the Caymans the possibility of keeping the agreement in force.

Q: 6. Great Britain: Why do we not have an MLAT with Great Britain?

A: We approached the United Kingdom in 1984 concerning the possibility of negotiating an MLAT. However, present U.K. law does not permit the provision of assistance in some of the forms and circumstances both we and the British want to provide on a reciprocal basis under the treaty, and new legislation is therefore required. It is our understanding that proposals concerning such legislation (which might also apply to mutual legal assistance with continental and commonwealth countries) are currently under consideration within Her Majesty's Government. It is our expectation that further negotiation of the MLAT and consideration of the necessary implementing legislation will take place later this year.

In the meantime, we negotiated and concluded an executive agreement with the United Kingdom concerning assistance in narcotics-related offenses, which takes into account the extent of assistance available under current U.S. and U.K. law.

Q: 7. Political Offense Exception. I note that the Cayman treaty has a "political offense" exception. Does this mean that Great Britain has altered its stance on that issue?

A: No. Both the British and the U.S. negotiators felt that the MLAT concerning the Cayman Islands would and should provide for assistance in a wide variety of circumstances, most importantly including narcotics trafficking cases and related offenses. Neither side believed that a narrowed political offense exception would be necessary to ensure the provision of legal assistance in these circumstances.

MEXICO

Q: 1. Camarena Case. Can you give us a concrete illustration of how the United States efforts to bring the murderers of DEA agent Camarena to justice would be helped by the pending mutual legal assistance treaty with Mexico?

A: Entry into force of the U.S.-Mexico MLAT would be helpful to our efforts to bring to justice the murderers of DEA agent Enrique Camarena. Specifically, evidence could be provided by Mexican authorities to aid in the prosecution pending in the Central District of California (Los Angeles) of individuals now in U.S. custody who are involved in the Camarena kidnapping and murder.

Since the signing and ratification by Mexico of the MLAT in December 1987, Robert Bonner, the United States Attorney in Los Angeles, has received significant assistance from the Mexican Attorney General's office regarding the provision of material and evidence of use in this prosecution. While recognizing that the Treaty is not yet

binding, Mexican Attorney General Garcia Ramirez has nonetheless indicated his intention to act in the spirit of the MLAT in providing assistance.

However, as of this date, certain other aspects of assistance needed by Mr. Bonner for his prosecution have not yet been provided. In this regard, the provision to Mr. Bonner may be an interesting "litmus test" of the extent to which the U.S.-Mexican MLAT will function efficaciously for U.S. law enforcement interests.

Q: -- Do we have a modern extradition treaty in place with Mexico?

A: This question is answered at pages 5 and 6, supra.

Q: -- Should we sign a mutual legal assistance treaty with a country if there is no modern extradition treaty in place?

A: [Answered during hearing.]

BAHAMAS

Q: 1. Search and Seizure. In a case involving "Project Haven," American law enforcement agents arranged for the hotel room of a visiting Bahamian bank official in Miami to be broken into, and the contents of his briefcase photographed. The Supreme Court ruled that the violation of the banker's fourth amendment rights did not prevent the information obtained from being used in prosecuting those whose names were revealed as a result of the violation. Will this treaty prevent the use of such information in the future?

A: Nothing in the Bahamas MLAT directly addresses law enforcement projects of this kind. However, we anticipate

that the Treaty will have a tendency to discourage such "projects" in the future in direct proportion to the extent that it proves to be an effective mechanism for U.S. prosecutors and investigators to obtain needed information from the Bahamas without resort to such approaches.

CANADA

Q: 1. Dual Criminality. If Canada were to enact criminal laws with respect to acid rain, could this treaty require U.S. authorities to cooperate in the prosecution of American corporations or their officers if those firms are accused of generating acid depositions? Why was the dual criminality requirement excluded from this treaty?

A: It is conceivable that if Canada were to enact criminal laws with respect to acid rain, this Treaty would be broad enough to cover a request for assistance for an investigation or prosecution based on those laws. It should be noted, however, that the Treaty might cover such requests for assistance even if there were a dual criminality requirement in it. For instance, The Clean Air Act, 42 U.S.C. sections 7401 et seq., regulating both stationary and mobile emissions sources of pollution, contains certain penal provisions which might be sufficient to establish dual criminality, depending on how Canada drafted its law.

To the extent that the purpose of this question is to determine what protection this Treaty has by which the U.S. could avoid assisting Canada with regard to an investigation

or prosecution contrary to the interests of the U.S., attention should be focused on Article V, Limitations on Compliance. That Article provides, among other things, that the Requested State may refuse assistance when the execution of the request is contrary to the public interest of the state. "Public interest" is defined by Article I of the Treaty as a "substantial interest related to national security or other essential public policy."

It was the intention of the negotiators that assistance would be denied as contrary to the public interest only on very rare occasions and only for the most serious reasons. It was also intended, however, to be flexible enough that neither state would find itself obligated to grant assistance when doing so would violate basic concepts of fairness and justice or would violate a fundamental public policy. In considering whether to deny a request as contrary to public interest, the presence of dual criminality (as might be the case with regard to Canadian acid rain penal legislation) would be a consideration, but it would not be dispositive. In other words, it is conceivable that the U.S. could deny assistance even if there were U.S. legislation similar to that under which the Canadian investigation or prosecution is proceeding.

As indicated during the hearings held on April 20, 1988, it is not possible to say at this time whether the

U.S. would refuse to assist Canada with regard to an investigation based on an as of now unenacted penal provision concerning acid rain on the basis of its being contrary to the public interest. However, while prejudging the matter is impossible, the hearings have raised our consciousness with regard to the acid rain issue, and the Executive Branch will treat any Canadian request for assistance with regard to such a case carefully and cautiously. Further, the decision whether to grant or deny a request (if Canada ever enacts such a statute and makes a request under it) for assistance as contrary to public interest will be made at the highest levels within the Department of Justice and only after consulting with the appropriate persons in our government.

With regard to the second question, concerning the lack of a dual criminality requirement in the Canadian Treaty with Canada, it was negotiated to be as broad in scope as possible. We consider that to be a desirable feature of the treaty because it increases the range of offenses for which the U.S. will be able to obtain assistance from the Canadians. For instance, by excluding the requirement of dual criminality from the treaty, the United States will be able to obtain assistance from the Canadians for such important offenses frequently used in prosecutions of drug traffickers as money laundering, 18

U.S.C. 1956, and currency transactions report offenses prosecuted under 31 U.S.C. 5322. Similarly, the U.S. will be able to obtain assistance from Canada under the Treaty as written for export control, transfer of high technology, and diversion cases. Canada does not have similar offenses such that if the treaty required dual criminality we could not obtain assistance from them for investigations and prosecutions under those statutes.

ADDITIONAL QUESTIONS REGARDING PENDING MLATs

Q: 1. Please provide for the Committee a detailed description of the process involved from the time a request for assistance under an MLAT is made until such assistance is obtained.

A: Once an MLAT request has been made by the U.S. central authority, the central authority of the Requested State, usually the Justice Ministry or its equivalent, reviews the request to see that all formal treaty requirements are met, that necessary information has been provided, and that the type of assistance sought is not one for which execution of assistance can or might be denied. Should a potential problem with compliance be presented, the Requested State is to notify and consult with the Requesting State, before the denial of a request.

Depending on the type of assistance required, the Central Authority then either obtains the information requested itself (for example, copies of official documents readily available to it) or passes the request on to the authority in the Requested State competent to obtain it (for example, if testimony is required, the request will be sent to an agent of the Requested State's Justice Ministry who can take necessary action to obtain the witnesses' presence at a proceeding at which his testimony can be taken).

Once the assistance requested has been obtained the Requested State transmits the information or evidence to the Requesting State.

While specific time limitations are not set forth in the treaties, due to the varied nature of assistance to be sought and time necessary to obtain such assistance, all of our treaties require that assistance be provided "promptly".

The practice followed in the United States when we are the requested State is the same. Usually the Department of Justice's Office of International Affairs will contact the United States Attorney's Office and/or other Federal law enforcement law authorities in the locality in which the assistance sought can be obtained and have them obtain it. In the case of compelled testimony, bank records, or other evidence, the United States Attorney's Offices apply to the

appropriate U.S. District Court under Title 28, U.S.C. 1782 to obtain process necessary to effect to the request.

QUESTIONS FROM THE TECHNICAL ANALYSIS OF THE BAHAMAS MLAT

Q: 2. In your analysis of the implementing legislation, are you satisfied that it does not in any way limit the scope of aid provided for in the treaty?

A: Our review of the implementing legislation indicates that the legislation does not limit the scope of the obligation to assist under the treaty. It is drafted broadly enough to encompass all of the Treaty's obligations. For example, article 4(1) of the legislation states that "where a request is presented in accordance with the provisions of a treaty, to the Competent Authority by a foreign state the Competent Authority shall deal with that request in such a manner as is requisite to discharge the obligations of The Bahamas under that treaty."

While the legislation on its face does not limit the scope of the treaty, we are somewhat concerned that certain provisions of the legislation could be abused by aggressive litigants in Bahamian judicial proceedings, for example the provisions relating to the taking of testimony for use abroad. Nonetheless, as discussed at the April 20 hearing, good faith implementation of the treaty's provisions should be sufficient to ensure that the scope of aid will be as

broad as provided for under the Treaty. We anticipate working closely with the Bahamian Central Authority [their Attorney General's Office] to ensure that United States' interests are well-represented in any judicial proceedings which may occur under the treaty.

Q: 3. With respect to the discussion of Article 3(1)(a)'s "security or essential public interests" in the Technical Analysis, what is the English common law jurisprudence on "public order"?

A: The Bahamian negotiators explained that the English common law jurisprudence on "public order" referred to essential public policy interests. Such interests are societal interests rather than the interests of the individual. Examples the Bahamians gave of such policy interests included upholding Bahamian legal provisions and protecting fundamental economic interests.

For your information, the U.S. intends to look to U.S. common law jurisprudence on the concept of "contrary to public policy." For example, in Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 1981 (N.Y. Court of Appeals, 1918), J. Cardozo, in discussing enforcement of another state's judgment by enforcing an award of damages to the family of a car crash victim, stated that a court should only withhold aid if it were based on "a cause of action in its nature

[that] offends our sense of justice or menaces the public welfare."

The negotiators believe that The Bahamas and the U.S. will interpret the provision in a very similar manner, such that the term "essential public interests" should only provide a narrow basis for denying assistance.

Q: 4. How was Article 3(1)(d) understood by the Bahamian delegation?

A: Article 3(1)(d) is derived from Article 7(2)(b) of the Commonwealth Scheme. We discussed with the Bahamians our understanding that requests would only be denied if the race, religion, or political opinions of the offender were the primary motivation for the request or the prosecution. They expressed concern about, in particular, racially motivated requests and agreed to narrower treaty language than they had originally proposed.

Q: 5. On page 20, there is a discussion of the use of the word "may" with regard to the obligation to execute a request for testimony. Is there any doubt that both the U.S. and Bahamian delegations intend that the treaty establish a mandatory obligation to arrange the production of the requested testimony?

A: No. The Technical Analysis simply makes explicit a matter discussed and agreed to between the delegations. The use of

the word "may" indicates that the Requested State is obligated to use compulsory process only when necessary, i.e. when a witness is not willing to appear voluntarily. The particular language used in this provision was crafted in part by the Bahamians and is somewhat different from the language in the Caymanian MLAT, for example. Accordingly, the negotiators felt it advisable to make the understanding between the delegations clear in the Technical Analysis.

Q: 6. On page 22, The European Convention on Mutual Assistance in Criminal Matters is referenced. Please provide the Committee with a copy of that Convention. How do the pending MLATs compare to that convention?

A: The European Convention provides for the use of letters rogatory, the service of writs and records of judicial verdicts, voluntary appearances of witnesses and certain other kinds of assistance.

The European Convention does not provide for as broad a range of assistance as the bilateral treaties negotiated by the United States. Nor does it make assistance mandatory to the extent our bilateral treaties do. Moreover, the bilateral treaties provide more specifically for assistance tailored to the law enforcement needs and judicial systems of the United States and our treaty partners.

As requested a copy of the European Convention on Mutual Assistance in Criminal Matters is attached.

QUESTIONS FROM THE TECHNICAL ANALYSIS OF

THE CAYMAN ISLANDS MLAT

Q: 7. Please describe in detail how the process under the provisions of the treaty designed to pierce the bank and business secrecy laws of the Cayman Islands would work.

A: Under Article 2 of the treaty, requests for bank records would be transmitted from the United States Central Authority to the Cayman Islands Central Authority. Thus, the Office of International Affairs in the Justice Department's Criminal Division will transmit requests for bank records to the "Cayman Mutual Legal Assistance Authority," an entity established under the Caymans' implementing legislation[4] to serve as the Caymans' Central Authority. That law says the Cayman Mutual Legal Assistance Authority shall be the Chief Justice, acting alone and in his administrative capacity. We anticipate that when United States requests are received by the Cayman Chief Justice, he will notify the Cayman Attorney General, who will take the request under review. The Attorney General will then advise the Chief Justice on how to proceed. Under Cayman law, the Chief Justice acting as Mutual Legal Assistance Authority has all of the powers of

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4 Section 4(1), Mutual Legal Assistance (United States of America) Law 1986.

the Grand Court to issue orders directly to the banks or other witnesses for the production of documents, to issue search warrants, or to command the police to serve documents or seize items of evidence specified in the request.[5] The law removes bank secrecy as a barrier to the execution of United States requests by specifically stating that a person who divulges confidential information in compliance with a request under the treaty shall not be deemed to have committed an offense in the Caymans Islands, nor shall such disclosure be deemed a basis for any civil action against the witness;[6] in short, the law effectively pierces bank secrecy by creating an exception for treaty requests. In fact, a bank or person who fails to obey the Chief Justice's order to produce documents can be penalized upon conviction by a fine of up to ten thousand dollars or two years imprisonment, or both.[7] After the requested evidence has been turned over to the Cayman Mutual Legal Assistance Authority, the evidence will be transmitted without delay to the united States Central Authority for forwarding to the prosecuting authority which generated the request.

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5 Section 7(1), ibid.

6 Section 10, ibid.

7 Section 16, ibid.

Q: 8. On page six of the analysis, it states that the U.S. delegation would not expect denial of a request as a political offense if it involved the kind of offenses listed in U.S.-U.K. Supplementary Extradition Treaty. Is that also the understanding of the Cayman Island authorities?

A: Neither the United Kingdom nor the Cayman Islands made any specific response to the United States delegation's position on this point during the negotiations. However, both delegations agreed that the definition of political offense to be employed under the MLAT should follow that used under the extradition treaty, and since the Supplementary Extradition Treaty contains that definition, it is reasonable to assume that the British and the Cayman Islands share the United States' view in this regard.

Q: 9. With respect to the Exclusivity Article of the Treaty, the analysis states that the basic thrust of the final paragraph is to insure that the U.S. "will not utilize unilateral compulsory measures unless it has first notified the Cayman authorities of the problem, sought their aid in the production of the records pursuant to Cayman law, accorded them a reasonable period of time for their response, then waited a further period to permit such diplomatic consultation as the parties deem appropriate.

Was there discussion between the delegations as to how long this process of freeing oneself from the obligations of other provisions in this Article would take? How do you envision this process working?

A: This provision was extensively discussed. It is anticipated that in those cases where denial of the request

or delay in execution would jeopardize the investigation, the United States Central Authority will notify the Cayman island Central Authority of this fact in the request. Pursuant to Article 17(4) of the treaty, this notice will alert the Central Authority of the Caymans that if the evidence is not produced under the treaty, the United States reserves the right to employ alternative means[8] for acquiring it. The United States may thereafter use alternative means, provided it gives Cayman authorities at least forty five days notice in writing that it views its obligations under Article 17 as having been satisfied. Thus, alternative means of evidence gathering may be employed if more than ninety days have elapsed from the sending of the request and the Central Authority of the Cayman Islands has been given at least forty five days notice in writing.

We anticipate that in any case where delay will jeopardize a United States investigation or proceeding and Cayman authorities would object to use of unilateral alternative means to acquire evidence, the requested party is free to initiate diplomatic discussions aimed at resolving the problem.

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8 Such methods would include a subpoena served commanding the United States branch of international banks or businesses to produce records from the Cayman Islands. See, e.g., In Re Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984).

On July 3, 1986, the United States and United Kingdom Governments exchanged diplomatic notes discussing some aspects of this provision. A copy of the exchange is attached hereto.

Q: 10. Under Article 7, Limitations on Use, the treaty requires that all evidence provided in response to requests under its provisions be kept confidential unless otherwise agreed, and that even where evidence obtained under the treaty has been revealed to the public in a trial, that evidence may be used only if one of three exceptions applies. As the analysis states, once evidence is made public in a trial, "it is practically impossible for the Central Authority of the Requesting Party to ... block[ing] the use of that information by third parties or other government agencies."

Are the three exceptions under Article 7 (4) sufficiently broad to protect the U.S. from charges that we are violating our treaty obligations to protect evidence obtained under the treaty?

A: While we would prefer to have no restrictions at all on the use of evidence which has already entered the public domain, we believe that in general the exceptions created in Article 7(4) give us sufficient flexibility to use evidence obtained under the treaty after it has been made public. False charges of misuse of treaty evidence may arise, if only because it is often in the interests of defendants to make baseless allegations in an effort to block the use of evidence critical in proving their guilt. However, as long as the channels of communication between Central

Authorities are kept open we believe that we can keep the record clear in this regard.

QUESTIONS FROM THE TECHNICAL ANALYSIS OF THE UNITED MEXICAN STATES MLAT

Q: 11. On page 11, in the discussion of Article 7, Testimony in the Requested State, it states that "there are certain limitations under Mexican domestic law ... which at present restrict full reciprocity in this area." Does this suggest that the U.S. anticipates changes in Mexican domestic law which will allow full reciprocity?

A: The United States does not anticipate any changes in Mexican law at this time which would allow for full reciprocity. This language is meant to reflect the possibility that, because there is no MLAT experience with any Latin American country, over a period of time Mexico's experience with the potential avenues for assistance offered by the MLAT may lead it to consider modification of its laws to better facilitate the effective use of the Treaty.

Q: 12. Similarly, on page 14 of the analysis, in the discussion relating to the availability of Mexican bank records pursuant to a treaty request, the analysis states that "Mexico ... currently has domestic law provisions limiting the disclosure of such records." Does this suggest that Mexico may be amending its domestic law in this area?

A: We have no information that suggests Mexico is amending its law in this area. Since 1985, the applicable law to secure bank records in Mexico has been "The Regulations for Banking and Credit Services of January 14, 1985" ("La Ley

Reglamentaria del Servicio de Banca y Credito de 14 de enero, 1985"), Articles 93-95. This law states that no disclosure of bank documents can be made unless:

1. the account holder, or legal representative, consents, or

2. an order is issued by a court, by virtue of the account holder being accused of a crime or being a party in judicial process, and the Treasury.

Q 13. The analysis of Article 11, Immobilizing, Securing and Forfeiture of Assets, expresses the hope that assets located in Mexico could be seized in aid of a prosecution, pursuant to Mexican law. What is Mexican law on seizing "proceeds, fruits or instrumentalities of crime?"

A: Mexican law on seizure of "proceeds, fruits or instrumentalities of crimes" is covered by Article 40 of the Mexican Criminal Code which states that "instruments of the crime as well as things which are objects or products of the crime will be seized if they are prohibited. If they are legitimate, they will be seized if the crime is intentional."

Q: 14. Does Mexico have a domestic statute similar to 18 U.S.C. 981(i)(1), authorizing it to transfer an equitable share of certain forfeited property to other countries?

A: Mexico does not have a domestic statute similar to 18 U.S.C. 981(i)(1).

THAILAND

Q: 15. The Thai MLAT contains a novel provision regarding initiating proceedings upon request. What is the purpose of this provision? Why is it not appropriate to the other pending MLATs?

A: The purpose of Article 14 of the U.S.-Thai MLAT was to provide a formal, regularized framework for requests from one State to the other to initiate criminal investigations or proceedings against offenders whom the requesting state's authorities either cannot prosecute or have determined are more appropriately prosecuted in the other state. This provision was suggested by the Thai delegation, and does not appear in the other pending MLATs because none of the countries with which those MLATs were signed requested such a provision. Moreover, each of the other MLATs contains language broad enough to permit each treaty partner to request initiation of proceedings by the other even though there is no specific article on the matter. For example, Article 1(2)(i) of the U.S.-Bahamas MLAT states that "[a]ssistance shall include any other matter mutually agreed upon" so assistance in exchanging requests to initiate prosecution would appear to be permissible if the parties agree.

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N° 30

EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

CONVENTION EUROPÉENNE D'ENTRAIDE JUDICIAIRE EN MATIÈRE PÉNALE

PREAMBLE

The Governments signatory hereto, being Members of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity among its Members;

Believing that the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this aim;

Considering that such mutual assistance is related to the question of extradition, which has already formed the subject of a Convention signed on 13th December 1957,

Have agreed as follows :

CHAPTER I

GENERAL PROVISIONS

ARTICLE 1

1. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

2. This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law.

ARTICLE 2

Assistance may be refused :

(*a*) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence;

(*b*) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

CHAPTER II

LETTERS ROGATORY

ARTICLE 3

1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.

3. The requested Party may transmit certified copies or certified photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request.

ARTICLE 4

On the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.

ARTICLE 5

1. Any Contracting Party may, by a declaration addressed to the Secretary-General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions :

(*a*) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party;

(*b*) that the offence motivating the letters rogatory is an extraditable offence in the requested country;

(*c*) that execution of the letters rogatory is consistent with the law of the requested Party.

2. Where a Contracting Party makes a declaration in accordance with paragraph 1 of this Article, any other Party may apply reciprocity.

ARTICLE 6

1. The requested Party may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings.

2. Any property, as well as original records or documents, handed over in execution of letters rogatory shall be returned by the requesting Party to the requested Party as soon as possible unless the latter Party waives the return thereof.

CHAPTER III

SERVICE OF WRITS AND RECORDS OF JUDICIAL VERDICTS — APPEARANCE OF WITNESSES, EXPERTS AND PROSECUTED PERSONS

ARTICLE 7

1. The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party.

Service may be effected by simple transmission of the writ or record to the person to be served. If the requesting Party expressly so requests, service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.

2. Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a declaration made by the requested Party that service has been effected and stating the form and date of such service. One or other of these documents shall be sent immediately to the requesting Party. The requested Party shall, if the requesting Party so requests, state whether service has been effected in accordance with the law of the requested Party. If service cannot be effected, the reasons shall be communicated immediately by the requested Party to the requesting Party.

3. Any Contracting Party may, by a declaration addressed to the Secretary-General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, request that service of a summons on an accused person who is in its territory be

transmitted to its authorities by a certain time before the date set for appearance. This time shall be specified in the aforesaid declaration and shall not exceed 50 days.

This time shall be taken into account when the date of appearance is being fixed and when the summons is being transmitted.

ARTICLE 8

A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.

ARTICLE 9

The allowances, including subsistence, to be paid and the travelling expenses to be refunded to a witness or expert by the requesting Party shall be calculated as from his place of residence and shall be at rates at least equal to those provided for in the scales and rules in force in the country where the hearing is intended to take place.

ARTICLE 10

1. If the requesting Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, it shall so mention in its request for service of the summons and the requested Party shall invite the witness or expert to appear.

The requested Party shall inform the requesting Party of the reply of the witness or expert.

2. In the case provided for under paragraph 1 of this Article the request or the summons shall indicate the approximate allowances payable and the travelling and subsistence expenses refundable.

3. If a specific request is made, the requested Party may grant the witness or expert an advance. The amount of the advance shall be endorsed on the summons and shall be refunded by the requesting Party.

ARTICLE 11

1. A person in custody whose personal appearance as a witness or for purposes of confrontation is applied for by the requesting Party, shall be temporarily transferred to the territory where the hearing is

intended to take place, provided that he shall be sent back within the period stipulated by the requested Party and subject to the provisions of Article 12 in so far as these are applicable.

Transfer may be refused :

(*a*) if the person in custody does not consent,

(*b*) if his presence is necessary at criminal proceedings pending in the territory of the requested Party,

(*c*) if transfer is liable to prolong his detention, or

(*d*) if there are other overriding grounds for not transferring him to the territory of the requesting Party.

2. Subject to the provisions of Article 2, in a case coming within the immediately preceding paragraph, transit of the person in custody through the territory of a third State, Party to this Convention, shall be granted on application, accompanied by all necessary documents, addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the Party through whose territory transit is requested.

A Contracting Party may refuse to grant transit to its own nationals.

3. The transferred person shall remain in custody in the territory of the requesting Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party from whom transfer is requested applies for his release.

ARTICLE 12

1. A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party.

2. A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party and not specified in the summons.

3. The immunity provided for in this article shall cease when the witness or expert or prosecuted person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned.

CHAPTER IV

JUDICIAL RECORDS

ARTICLE 13

1. A requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case.

2. In any case other than that provided for in paragraph 1 of this Article the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested Party.

CHAPTER V

PROCEDURE

ARTICLE 14

1. Requests for mutual assistance shall indicate as follows :

(*a*) the authority making the request,

(*b*) the object of and the reason for the request,

(*c*) where possible, the identity and the nationality of the person concerned, and

(*d*) where necessary, the name and address of the person to be served.

2. Letters rogatory referred to in Articles 3, 4 and 5 shall, in addition, state the offence and contain a summary of the facts.

ARTICLE 15

1. Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.

2. In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.

3. Requests provided for in paragraph 1 of Article 13 may be addressed directly by the judicial authorities concerned to the appropriate authorities of the requested Party, and the replies may be returned directly by those authorities. Requests provided for in paragraph 2 of Article 13 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party.

4. Requests for mutual assistance, other than those provided for in paragraphs 1 and 3 of this article and, in particular, requests for investigation preliminary to prosecution, may be communicated directly between the judicial authorities.

5. In cases where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organisation (Interpol).

6. A Contracting Party may, when signing this Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary-General of the Council of Europe, give notice that some or all requests for assistance shall be sent to it through channels other than those provided for in this article, or require that, in a case provided for in paragraph 2 of this article, a copy of the letters rogatory shall be transmitted at the same time to its Ministry of Justice.

7. The provisions of this article are without prejudice to those of bilateral agreements or arrangements in force between Contracting Parties which provide for the direct transmission of requests for assistance between their respective authorities.

Article 16

1. Subject to paragraph 2 of this article, translations of requests and annexed documents shall not be required.

2. Each Contracting Party may, when signing or depositing its instrument of ratification or accession, by means of a declaration addressed to the Secretary-General of the Council of Europe, reserve the right to stipulate that requests and annexed documents shall be addressed to it accompanied by a translation into its own language or into either of the official languages of the Council of Europe or into one of the latter languages, specified by it. The other Contracting Parties may apply reciprocity.

3. This article is without prejudice to the provisions concerning the translation of requests or annexed documents contained in the agreements or arrangements in force or to be made, between two or more Contracting Parties.

ARTICLE 17

Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication.

ARTICLE 18

Where the authority which receives a request for mutual assistance has no jurisdiction to comply therewith, it shall, *ex officio*, transmit the request to the competent authority of its country and shall so inform the requesting Party through the direct channels, if the request has been addressed through such channels.

ARTICLE 19

Reasons shall be given for any refusal of mutual assistance.

ARTICLE 20

Subject to the provisions of Article 9, execution of requests for mutual assistance shall not entail refunding of expenses except those incurred by the attendance of experts in the territory of the requested Party or the transfer of a person in custody carried out under Article 11.

CHAPTER VI

LAYING OF INFORMATION IN CONNECTION WITH PROCEEDINGS

ARTICLE 21

1. Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministries of Justice concerned unless a Contracting Party avails itself of the option provided for in paragraph 6 of Article 15.

2. The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced.

3. The provisions of Article 16 shall apply to information laid under paragraph 1 of this article.

CHAPTER VII

EXCHANGE OF INFORMATION FROM JUDICIAL RECORDS

ARTICLE 22

Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.

CHAPTER VIII

FINAL PROVISIONS

ARTICLE 23

1. Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary-General of the Council of Europe.

3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

ARTICLE 24

A Contracting Party may, when signing the Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary-General of the Council of Europe, define what authorities it will, for the purposes of the Convention, deem judicial authorities.

ARTICLE 25

1. This Convention shall apply to the metropolitan territories of the Contracting Parties.

2. In respect of France, it shall also apply to Algeria and to the overseas Departments, and, in respect of Italy, it shall also apply to the territory of Somaliland under Italian administration.

3. The Federal Republic of Germany may extend the application of this Convention to the *Land* of Berlin by notice addressed to the Secretary-General of the Council of Europe.

4. In respect of the Kingdom of the Netherlands, the Convention shall apply to its European territory. The Netherlands may extend the application of this Convention to the Netherlands Antilles, Surinam and Netherlands New Guinea by notice addressed to the Secretary-General of the Council of Europe.

5. By direct arrangement between two or more Contracting Parties and subject to the conditions laid down in the arrangement, the application of this Convention may be extended to any territory, other than the territories mentioned in paragraphs 1, 2, 3 and 4 of this article, of one of these Parties, for the international relations of which any such Party is responsible.

ARTICLE 26

1. Subject to the provisions of Article 15, paragraph 7, and Article 16, paragraph 3, this Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between any two Contracting Parties.

2. This Convention shall not affect obligations incurred under the terms of any other bilateral or multilateral international convention which contains or may contain clauses governing specific aspects of mutual assistance in a given field.

3. The Contracting Parties may conclude between themselves bilateral or multilateral agreements on mutual assistance in criminal matters only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.

4. Where, as between two or more Contracting Parties, mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system. Contracting Parties which, in accordance with this paragraph, exclude as between themselves the application of this Convention shall notify the Secretary-General of the Council of Europe accordingly.

ARTICLE 27

1. This Convention shall be open to signature by the Members of the Council of Europe. It shall be ratified. The instruments of ratification shall be deposited with the Secretary-General of the Council.

2. The Convention shall come into force 90 days after the date of deposit of the third instrument of ratification.

3. As regards any signatory ratifying subsequently the Convention shall come into force 90 days after the date of the deposit of its instrument of ratification.

ARTICLE 28

1. The Committee of Ministers of the Council of Europe may invite any State not a Member of the Council to accede to this Convention, provided that the resolution containing such invitation obtains the unanimous agreement of the Members of the Council who have ratified the Convention.

2. Accession shall be by deposit with the Secretary-General of the Council of an instrument of accession which shall take effect 90 days after the date of its deposit.

ARTICLE 29

Any Contracting Party may denounce this Convention in so far as it is concerned by giving notice to the Secretary-General of the Council of Europe. Denunciation shall take effect six months after the date when the Secretary-General of the Council received such notification.

ARTICLE 30

The Secretary-General of the Council of Europe shall notify the Members of the Council and the Government of any State which has acceded to this Convention of :

(*a*) the names of the Signatories and the deposit of any instrument of ratification or accession;

(*b*) the date of entry into force of this Convention;

(*c*) any notification received in accordance with the provisions of Article 5 - paragraph 1, Article 7 - paragraph 3, Article 15 - paragraph 6, Article 16 - paragraph 2, Article 24, Article 25 - paragraphs 3 and 4, or Article 26 - paragraph 4;

(*d*) any reservation made in accordance with Article 23, paragraph 1;

(*e*) the withdrawal of any reservation in accordance with Article 23, paragraph 2;

(*f*) any notification of denunciation received in accordance with the provisions of Article 29 and the date on which such denunciation will take effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

DONE at Strasbourg,
this 20th day of April 1959,
in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General of the Council of Europe shall transmit certified copies to the signatory and acceding Governments.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente Convention.

FAIT à Strasbourg, le 20 avril 1959,
en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Conseil de l'Europe. Le Secrétaire Général du Conseil en enverra copie certifiée conforme aux Gouvernements signataires et adhérents.

For the Government
of the Republic of Austria :

Reservation to Article 1 (1)

Austria will only grant assistance in proceedings in respect of offences also punishable under Austrian law and the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities.

Reservation to Article 2 (*a*)

Austria will not lend assistance in the case of offences referred to under (a).

Reservation to Article 2 (*b*)

In " other essential interests of its country " Austria will include maintaining the secrecy stipulated by Austrian legislation.

Declaration concerning Article 5 (1)

Austria will make the execution of letters rogatory for search or seizure of property subject to the condition laid down in sub-paragraph (c).

Declaration concerning Article 16 (2)

Austria will require that requests for assistance and annexed documents which, in accordance with Article 15 (2), *will*

Pour le Gouvernement
de la République d'Autriche :

Réserve au paragraphe 1 de l'article 1er

L'Autriche n'accordera l'entraide judiciaire que dans les procédures visant des infractions également punissables selon le droit autrichien dont la répression serait, au moment où l'entraide est demandée, de la compétence des autorités judiciaires.

Réserve à l'alinéa (*a*) de l'article 2

L'Autriche refusera l'entraide judiciaire pour les infractions énoncées à l'alinéa (*a*).

Réserve à l'alinéa (*b*) de l'article 2

Par « autres intérêts essentiels de son pays », l'Autriche entend notamment la protection de l'obligation du secret prévue par la législation autrichienne.

Déclaration concernant le paragraphe 1 de l'article 5

L'Autriche soumettra l'exécution des commissions rogatoires aux fins de perquisition ou saisie d'objets aux conditions stipulées à l'alinéa (c).

Déclaration concernant le paragraphe 2 de l'article 16

L'Autriche exigera que les demandes d'entraide judiciaire et pièces annexes qui, conformément au paragraphe 2

be addressed directly to the Austrian judicial authorities or Department of Public Prosecution, shall be accompanied by a translation into German.

de l'article 15, seront adressées directement aux autorités judiciaires pénales autrichiennes ou au ministère public autrichien, soient accompagnées d'une traduction en langue allemande.

Declaration concerning Article 24

For the purposes of the Convention, Austria will regard as judicial authorities the Criminal Courts, the Department of Public Prosecution and the Federal Ministry of Justice.

Déclaration concernant l'article 24

Aux fins de la présente Convention, l'Autriche considérera comme autorités judiciaires autrichiennes les tribunaux de l'ordre pénal, le ministère public et le Ministère fédéral de la Justice.

Leopold FIGL

For the Government of the Kingdom of Belgium :

On signing the European Convention on Mutual Assistance in Criminal Matters the Belgian Government declares :

1. that it will avail itself of the option provided for under Article 5 (1) b of the Convention and will not allow execution of letters rogatory for search or seizure except for extraditable offences ;

2. that it makes the following reservations :

(a) *the temporary transfer of prisoners provided for in Article 11 will not be authorised ;*

(b) *the " subsequent measures " referred to in Article 22 will not be notified automatically ; but the possibility of such notification will not be ruled out in particular cases and on the request of the authorities concerned ;*

(c) *the Belgian Government, notwithstanding the provisions of Article 26, reserves the right to maintain or to conclude with adjacent countries bilateral or multilateral agreements offering wider scope for mutual assistance in criminal matters.*

Pour le Gouvernement du Royaume de Belgique :

Au moment de la signature de la Convention européenne d'entraide judiciaire en matière pénale, le Gouvernement belge déclare :

1. qu'il fait usage de la faculté prévue au paragraphe 1 (b) de l'article 5 de la Convention et ne permettra l'exécution des commissions rogatoires aux fins de perquisition ou saisie d'objets que pour des faits susceptibles de donner lieu à extradition ;

2. qu'il formule les réserves suivantes :

(a) *le prêt de détenus visé à l'article 11 ne sera pas autorisé ;*

(b) *la communication des « mesures postérieures » visée à l'article 22 ne sera pas faite automatiquement ; toutefois, la possibilité de cette communication ne sera pas exclue dans des cas d'espèce et sur demande des autorités intéressées ;*

(c) *Le Gouvernement belge, nonobstant les dispositions de l'article 26, se réserve le droit de maintenir ou de conclure avec des pays limitrophes des traités bilatéraux ou multilatéraux offrant des possibilités plus larges pour l'entraide judiciaire en matière pénale.*

P. WIGNY

For the Government of the Kingdom of Denmark :

Pour le Gouvernement du Royaume de Danemark :

Kjeld PHILIP

For the Government of the French Republic :

Pour le Gouvernement de la République française :

The French Government declares that, by reason of the internal organisation and functioning of the judicial records department in France, the authorities responsible are unable to inform automatically the Contracting Parties to the present Convention, under Article 22 thereof, of measures taken subsequently to the conviction of their nationals—such as measures of clemency, rehabilitation or amnesty—which are entered in the judicial records.

Le Gouvernement français déclare que, en raison de l'organisation interne et du fonctionnement du casier judiciaire en France, les autorités qui en sont chargées se trouvent dans l'impossibilité matérielle de donner automatiquement avis aux Parties Contractantes à la présente Convention, conformément à l'article 22, des mesures intervenues postérieurement à la condamnation de leurs ressortissants — telles que les mesures de grâce, de réhabilitation ou d'amnistie — qui font l'objet d'une inscription au casier judiciaire.

The French Government gives, however, an assurance that the responsible authorities, if requested to do so in particular cases, will as far as possible supply the said Contracting Parties with details of the position of their nationals as regards the criminal law.

Il donne cependant l'assurance que ces autorités, lorsqu'elles en seront requises à propos de cas particuliers, préciseront dans la mesure du possible auxdites Parties Contractantes la situation pénale de leurs ressortissants.

The French Government declares that the authorities to be considered for the purposes of this Convention as French judicial authorities are the following :

- *first presidents, presidents, counsellors and judges ("conseillers") of criminal courts,*
- *examining magistrates ("juges d'instruction") of those courts,*
- *members of the Department of Public Prosecution ("ministère public") acting in those courts, namely :*
- *directors of Public Prosecution,*
- *deputy directors of Public Prosecution,*
- *Assistant Public Prosecutors,*
- *heads of the Prosecution Department in courts of first instance and their assistants,*

Le Gouvernement français déclare que, doivent être considérées comme autorités judiciaires françaises aux fins de la présente Convention les autorités suivantes :

- *les premiers présidents, présidents, conseillers et juges des juridictions répressives,*
- *les juges d'instruction desdites juridictions,*
- *les membres du ministère public près lesdites juridictions, à savoir :*
- *les procureurs généraux,*
- *les avocats généraux,*
- *les substituts des procureurs généraux,*
- *les procureurs de la République et leurs substituts,*

— *representatives of the Department of Public Prosecution in police courts,*

— *judge-advocates in courts martial.*

— *les représentants du ministère public auprès des tribunaux de police,*

— *les commissaires du gouvernement près les tribunaux des forces armées.*

For the Government of the Federal Republic of Germany :

Pour le Gouvernement de la République fédérale d'Allemagne :

von MERKATZ

For the Government of the Kingdom of Greece :

The Greek Government formulates reservations with regard to Articles 4 and 11 of the Convention, which are incompatible with Articles 97 and 459 of the Greek Code of Criminal Procedure.

Pour le Gouvernement du Royaume de Grèce :

Le Gouvernement hellénique formule des réserves formelles sur les articles 4 et 11 de la Convention, leur acceptation étant incompatible avec les articles 97 et 459 du Code hellénique de procédure pénale.

CAMBALOURIS

For the Government of the Icelandic Republic :

Pour le Gouvernement de la République islandaise :

EXCERPT FROM HEARING OF TUESDAY, JUNE 14, 1988

The committee met at 10:08 a.m., in room SD-419, Dirksen Senate Office Building, Hon. John Kerry presiding.

Present: Senators Kerry, Sanford, Adams, Helms, Pressler, Trible, and McConnell.

Senator KERRY. The hearing will come to order, please.

I would like to ask our witnesses, Mr. Pisani, Mr. Zagaris, and Mr. White, to come forward to the witness table.

Today, the Committee on Foreign Relations Relations is going to complete its hearings on the pending Mutual Legal Assistance Treaties with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand

Last April 20, we did have hearings before the Committee, during which time the Justice Department and the State Department urged the ratification of these six treaties. Subsequent to that, the distinguished Ranking Minority Member of the Committee requested that there be additional testimony because of his concerns about the possible use of these treaties to circumvent United States due process guarantees, as well as about the lack of access to the treaty mechanism on the part of defendants.

So, today we will hear those concerns aired through the testimony of a number of private practitioners who have dealt and continue to deal with these matters.

I welcome these witnesses. We look forward to having their testimony and providing the Committee with the tools necessary to strengthen our ability to implement these treaties.

What I would like to do is ask each of you, if you would, to make your opening statements, and, subsequent to that, we will proceed with the questioning from the Members of the Committee.

Let me just turn to the distinguished Senator from Virginia and ask if he has any opening comments.

Senator TRIBLE. I do not. Thank you, Mr. Chairman.

I look forward to the testimony.

Senator KERRY. Why don't I ask the witnesses if there is any order in which they would prefer to proceed. Select among yourselves who will lead off.

If you would, please identify yourself fully for the record as you testify.

STATEMENT OF ROBERT L. PISANI, ESQ., EXECUTIVE DIRECTOR, INTERNATIONAL LEGAL DEFENSE COUNSEL, PHILADELPHIA, PA

Mr. PISANI. My name is Robert Pisani. I am the Executive Director of International Legal Defense Counsel.

Senator KERRY. Would you pull the microphone just a little bit closer. This room is not great acoustically, and that would be very helpful.

Thank you.

Mr. PISANI. My name is Robert Pisani, and I am the Executive Director of International Legal Defense Counsel in Philadelphia. We are an organization that provides legal assistance to Americans who live and travel abroad.

The majority of our work is concerned with international criminal law aspects primarily, representing Americans who are arrested abroad, prisoner transfer treaties, and extradition matters.

I am the author of two articles on mutual legal assistance treaties, and I am also a member of the Committee on International Criminal Law of the American Bar Association's Section on International Law and Practice, which has considered these treaties in the past.

I appreciate the opportunity to testify today on the subject of mutual legal assistance treaties.

I believe that MLATS are a very important law enforcement tool. I want to say that from the very beginnning. I believe the Department of Justice needs to have these tools to investigate international crimes.

However, we have a number of concerns about them, and I would like to highlight one in particular, and that is the inability of defendants to have access to the treaty.

I believe that this is probably the most critical issue facing defendants who may encounter these treaties in the future.

The Department of Justice has already stated that the reason they need the MLATS is to replace the outdated and inefficient letters rogatory method. You are absolutely correct about this. Anybody who has had any real, practical experience with letters rogatory can only throw up their hands in horror at the fact that it is a Ninetheenth Century method of gathering evidence abroad. But, even with countries where we have the best of relations, it takes an average of 6 months now to have a return on a letters rogatory. That is far too long in the Twentieth Century to wait.

By contrast, requests made via MLATS can often be turned around and received in a matter of weeks, and, in some cases, even shorter.

With that said, it is surprising that so much effort has been made to deny criminal defendants access to the treaties. Virtually all the MLATS in force and all six of those in front of us today have provisions that explicitly deny defendants access to the treaties to gather exculpatory evidence.

It seems to me that this is not just a procedural question; rather, fundamental issues of fairness and due process are at stake here.

The Department of Justice understandably states that they don't want to wait six months to gather evidence under letters rogatory. But they don't have any problem with making a defendant wait that long to gather exculpatory evidence.

If there is a trial in progress or a date has been set for a trial in the near future, it will be virtually impossible for the defendant to gather the evidence in time using letters rogatory.

I want to stress at this point that we are not talking about opening up these treaties to parties in commercial or civil cases. These parties can continue to use letters rogatory or any other applicable convention. We are referring only to individuals involved in criminal cases.

I want to be even more specific here because I fear there has been some misunderstanding as to what our position is.

We are not requesting that defendants be permitted to utilize government investigative agencies on their behalf. What we are

saying is that defendants should have the right to obtain evidence through the treaties pursuant to rule 15 of the Federal Rules of Criminal Procedure. That rule allows the taking of depositions and documentary evidence located abroad only if the defendant can persuade the trail court that the taking of the deposition or the documentary evidence is in the interest of justice.

We, thus, already have the right to take depositions and gather documentary evidence abroad. And we are only seeking to be able to utilize the treaties as the prosecution does, rather than wait six months or more to utilize the letters rogatory procedure.

This is absolutely essential because, once an indictment is handed down, this time delay can prove fatal to the defense.

In addition—and this is another very important point—letters rogatory do not contain any compulsory process to obtain evidence abroad. In other words, letters rogatory are based entirely on comity. There is no way we can compel witnesses to testify under letters rogatory.

However, the MLATS do contain a compulsory process provision.

The Department of Justice will, thus, have the means of obtaining compulsory process, whereas defendants will have none. I believe that this fact may raise very serious questions under the compulsory process clause of the Sixth Amendment.

I think this issue is so crucial that the Senate should address it. One alternative is for the Senate to adopt an understanding that the term "private parties" does not include criminal defendants. Another alternative is to have an exchange of notes between the parties containing this understanding, which would, of course, involve having the Senate delay ratification until the notes had been exchanged.

I would like to make one final comment about the paucity of information that we have on these treaties in general.

Remarkably little is known about MLATS and how they could procedurally operate.

When I first began researching this question for a law review article in 1983, I was struck by how little information was available on them. No constitutional law scholar that I was aware of had ever really sat down and seriously analyzed the treaties. There seems to be little understanding as to how powerful the treaties really are.

Very few issues have been litigated under the treaty, and there is very little case law that exists on them. Other authors and witnesses have noted concerns over admissibility of evidence and safe conduct under several of the treaties, and I believe that these issues should be considered by the Senate.

What strikes me about the treaties is how powerful they are. They permit the U.S. Department of Justice to go into a foreign country and conduct an investigation with the cooperation of the host country. Conversely, they permit foreign governments to come into our country and conduct investigations of our citizens with the cooperation of the U.S. Department of Justice.

With few exceptions, this cooperation is compulsory.

In the past, the treaties have not been extensively utilized and hardly at all with the exception of the Swiss Treaty. Now we are on the verge of enacting six treaties with a number of countries

with which we enjoy very close relations, particularly Mexico and Canada. They are certain to be extensively utilized on a scale that we have not yet seen.

However, a number of these concerns that we have discussed have been hardly raised outside of a very small circle of individuals.

At the very least, I would urge the Committee to take steps to permit private defendants in criminal cases to have access to the treaties, and to seriously consider other concerns that have been raised by scholars and practitioners who have previously testified on this issue.

Thank you.

Senator KERRY. Thank you.

Mr. Zagaris.

STATEMENT OF BRUCE ZAGARIS, ESQ., BERLINER & MALONEY, WASHINGTON, DC

Mr. ZAGARIS. Good morning, Mr. Chairman and Committee Members. I will summarize my remarks and ask that the full statement be included in the record, as it is customary for the Committee to do.

Senator KERRY. In all cases, a full reprinting of your statements will be made, as if read in full.

Mr. ZAGARIS. Thank you.

Because the United States Government has so few mutual legal assistance treaties now in force, the consideration of the six pending MLATS is very important. In particular, at least four of the governments with which MLATS are now pending are very important for narcotics and money laundering.

Despite the problems that have been raised with these pending MLATS, I believe that the Committee should recommend that advice and consent to them be given.

I want first to turn to some of the procedural considerations in negotiating criminal agreements.

To assure full and timely Congressional input and avoid potential surprises during the ratification process, both on mutual legal assistance treaties and other international agreements, the State and Justice Departments should regularly brief this Committee and other Congressional Committees on the status of treaty negotiations, and both the long-term policy, as well as the individual status of the treaty negotiations.

As this Committee knows, after negotiations have taken place and agreements have been signed, it is very difficult to go back and to renegotiate the treaties, even if there are problems in ratification.

Another problem in the procedural consideration of these treaties is that the government should make both the treaties themselves, as well as the technical analyses, available to interested members of the public, so that, at the beginning of the consideration of these treaties, this Committee and other Congressional Committees can have the input of interested persons who have a lot of experience and expertise in dealing with these agreements.

Another very important procedural matter is that mutual legal assistance treaties are so important and the process of negotiating and ratifying these treaties so time consuming that Congress should review and supplement existing legislation with a body of procedural and substantive rules governing all forms of international cooperation in criminal matters.

In some cases, where other governments reciprocate, the United States should cooperate in the above of treaties. Indeed, the Swiss Government has such comprehensive legislation.

Turning now to the scope of the MLATS, our government should show deference when it negotiates the MLATS and should try to include in them as many crimes ase possible. Necessarily, the MLATS with some countries, such as the Cayman Islands and the Bahamas, which have a very important offshore financial sector, are going to be limited.

Nevertheless, I think that these MLATS that have a limited scope are important first steps and that we should conclude such agreements, and that we should try, wherever possible, to expand their scope. I think that the goodwill and cooperation with these countries will result in an expanded cooperation.

Turning now to the question of whether defendants should have access to these MLATS, defendants in criminal cases undoubtedly should have access to the mutual legal assistance treaties. Without equal access to the compulsory process for obtaining evidence from abroad afforded by these treaties, defendants in criminal cases will be at a significant disadvantage in litigating their cases.

The United States Government should, as a matter of basic fairness, give defendants in United States courts equal access. Forcing defendants to rely on letters rogatory or other means will result in the same limitations which the United States Government faces when it tries to obtain information from countries with which we do not have an MLAT.

Despite the fact that the United States-Mexico MLAT authorizes only and does not guarantee the right to cross examine witnesses in Mexico, the benefits of the treaty outweigh the disadvantages of the inability of U.S. persons to directly examine witnesses. This Committee should monitor the implementation of the proposed United States-Mexico MLAT to insure that this provision is implemented properly and in good faith, and it could do so in these periodic briefings or it could do so by having oversight hearings from time to time.

Turning now the question of safe conduct for witnesses, the pending MLATS provide for safe conduct for the persons from a requesting state who, pursuant to the execution of a request, goes to testify in a requesting country.

On balance, it seems that safe conduct tradition should be included in a protocol to the Mexico and Canada MLATS and in future, MLATS, since they would provide additional mechanisms to encourage witnesses to voluntarily appear and testify in the requesting country.

The requirement of a review and the establishment of working groups to implement MLATS has achieved dynamic results. This point has really not been mentioned during the previous hearings, but I think they alone have made MLATS very important. The ex-

ample of that is in the United States-Italy cooperation. The establishment of informal working groups and the holding of six conferences has resulted in important cooperation in organized crime, terrorism, narcotics and money laundering. A number of these cases have been mentioned in the media, and they have been very successful.

The final point I want to turn to is the need for regional mechanisms for international criminal cooperation.

The United States Congress, under the leadership of this Committee and the Judiciary Committees, and the United States Executive, should help build strong, regional mechanisms to combat transnational crime.

We should make an active effort to participate in regional groups which design and negotiate multilateral conventions similar to those that the European Committee on Crime Problems has been successful in negotiating.

MLATS are only one small instrument whereby our criminal justice system seeks help in litigating transnational crimes. Our law enforcement officials are battling individuals and organizations which often have superior resources, and whose activities are not constrained by the sovereignty of nation-states.

If our and other concerned governments are to successfully battle organized crime and improve the administration of justice, the United States policymakers must meet daily with their counterparts in the region. They must be able to discuss ongoing investigations, extradition requests, assistance in pending trials, transfer of prisoners, enforcement of judgments, and so forth.

They must also, on a regular basis, be able to discuss the leading types of crime and how to deal with it, such as crimes against humanity, narcotics, trafficking of arms and organized crime.

To effectively do this, we need a regional body where governments are represented at the Assistant Attorney General level. They would devote attention to international agreements which require drafting, ratification, and amendment, and they would also deal with ways to improve all aspects of criminal justice. That body would benefit from existing regional organizations, and the body would coordinate its activites with regional organizations, such as the Caribbean Common Market, and the Administration of Justice Projects which the United States has started right now in Central America and the Caribbean.

Finally, this Committee should work with the various nongovernmental groups which have expertise and experience in dealing with international criminal justice.

With that, I will end my formal remarks.

Thank you.

Senator KERRY. Thank you very much, Mr. Zagaris.

Mr. White.

STATEMENT OF PHILIP T. WHITE, ESQ., ADAMS, McCULLOUGH & BEARD, AND FORMER DIRECTOR OF THE OFFICE OF INTERNATIONAL AFFAIRS, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. WHITE. Senator Kerry, Senator Helms, thank you for letting me testify. I am here today in my capacity as a lawyer in private practice. Until, however, last July and for four and a half years before that, I was the Director of the Office of International Affairs in the Criminal Division at Justice. I was the person who acted as the central authority under the existing treaties with Switzerland, with Turkey, with Italy, and with the Netherlands.

I had a close-up, birds-eye view of how the treaties work and I don't think I have to belabor the argument that seems to be conceded by even the critics about some of the provisions of these treaties, the MLATS, or mutual legal assistance treaties are the way to proceed in today's modern world, with all of the transnational crime that we are facing.

That is my judgment, based on my experience.

MLATS got the evidence more quickly, more efficiently, and one of the magic things about MLATS is, as Mr. Zagaris and Mr. Pisani have suggested, they give us kinds of evidence that we cannot necessarily get by letters rogatory.

They expand the scope of assistance in orders authorized under foreign law by giving us search and seizure evidence, et cetera.

One other matter that I would like to discuss—and I gather this came up in the earlier hearings on April 10, Senator Kerry, in colloguy between you and Mark Richards, who is the Deputy Assistant Attorney General in the Justice Department. I think the question was raised with respect to certain of the treaties as to whether or not the Senate should advise and consent in light of the fact that certain critics felt that perhaps the parties on the other side were not negotiating in good faith, would not administer the treaties in good faith.

I would like to address that personally, based on my experience, having participated in the negotiations, on the delegation, the U.S. delegation, with the State Department and other members of the Department of Justice on the Thai Treaty, the Bahamian Treaty, the Cayman Treaty and the Canadian Treaty, and and having been involved, though not in nogotiations certainly in the policy decision relating to the Mexican Treaty and the Belgian Treaty.

In my experience over long months and many sessions, arduous sessions, where significant problems between the different governments, different customs, different systems of law, and to be compromised and accommodated, one got to know the negotiating partners. Granted, they are not the governments of these other parties but they certainly are perhaps some of the most outstanding individuals in the foreign ministries of justice and foreign affairs, who, like us, often are civil servants, professional lawyers, who are expert in negotiating these kinds of legal arrangements.

I came away, in some cases after two years, but in each case I came away with the feeling that we were dealing with certainly able men, responsible men, and people, in my opinion, who were honorable men.

I am optimistic enough to think that, with the problems that beset these countries, particularly those in the Caribbean—the Bahamians, the Cayman Islanders, and these are the ones where these treaties will probably have the most immediate impact, in terms of returns and fruits from requests for assistance if these treaties are enacted, in terms of piercing the veil of secrecy in the financial institutions, the trust companies, the bank in the Caymans, and in the Bahamas—and particularly with significant drug cases, it would seem to me that this, alone, would justify and attempt to test the good faith.

The other side of it is if we don't go ahead with these treaties, we are going to be faced with significant problems in trying to determine whether we should unleash our extraterritorial subpoenaes, which, as you know, and as all the testimony has suggested, creates terrible international tensions. I have seen it happen.

I have seen ambassadors from certain countries which I will not name come in and make a formal protest because of the use of these extraterritorial subpoenaes.

Do not mistake my remarks now, Senators. I take the view that the United States has the right, under international law, to assert its jurisdiction if there is an entity in this country that is doing business here and is doing business in one of these islands, that we have the right to order them to produce records by putting a subpoena on them in the United States, calling for records in these jurisdictions. I support that.

I think the courts so far, certainly the courts of appeals, in most cases have upheld it. There is a decision here in the District of Columbia were the Court of Appeals, in a sealed opinion, did not allow access to these records and overturned a contempt holding by the lower court.

I am not sure where the Supreme Court will come out on this. I think in all probability, they will uphold it. But, apart from the legality of it, the constitutionality of its, it does create serious foreign relations problems. That would be the alternative that I see if those treaties are not passed.

We would have no other remedy except to use them. This along would not perhaps result in us acquiring the evidence because there will be long litigation and delays, and we all know that justice delayed is perhaps justice denied.

I will be happy, Senators, to respond to any of the questions you have relating to the presentations by Mr. Zagaris and Mr. Pisani. I am happy that they seem, notwithstanding the pot shots that they take at certain provisions of the treaties, basically to feel that mutual assistance treaties are the way to go, that these treaties should be retified.

I would be happy to answer any questions in these areas.

Thank you.

Senator KERRY. Thank you very much, gentlemen. We appreciate your testimony.

Senator Helms apologized privately to me and he will do so for himself, I known, for arriving late. He has a conflict and that was the reason for his delay.

But I want to turn to him, if I can now, for any opening statement and questions that he may have.

Senator HELMS. Mr. Chairman, thank you very much.

At the outset, let me thank you and Senator Pell for scheduling this hearing. I believe I indicated about a month ago that my judgment is it is exceedingly important to obtain views of erudite experts beyond those in and of the government on matters as significant as these treaties are today.

Mr. Chairman, I find it necessary to go back and forth between here and the Agriculture Committee. We have a decidedly important piece of legislation there, which will cost $2 billion or $3 billion.

I see some young people, whom I judge to be the students, in the back of the room, and they ought to have interest in that.

I have watched the faces of some of the young people while our testimony was going on and I want to assure them that it is not gobble-de-gook. We are not just wasting time analyzing these treaties because the Senate under the Constitution has the duty to examine all treaties, and to provide its advice and consent. So this is not a frivolous thing. If it sometimes appears that we are going into every jot and tittie, that is what we are supposed to do, to make the treaties as best as we possibly can.

Now, I am not a lawyer, and I don't pretend to be one. Sometimes I boast that I am not a lawyer. But I am dedicated to the United States Constitution. I think it is the finest document ever conceived by the mind of man.

Notwithstanding any other view, I am concerned about the rights of American citizens abroad, particularly when they are subject to foreign legal systems that do not provide the protections granted to American citizens by the United States Constitution.

Now, I recognize that the mutual legal assistance treaties—and that is what these are—or MLATS, are intended from the U.S. perspective to be a weapon against organized crime, against terrorists, against drug producers and distributors, and against criminal tax evaders. I have strongly supported cooperative efforts on the international level to deal with this kind of criminality, and I will continue to support measures designed to bring these despicable characters to justice, wherever they are.

But, on the other hand, Mr. Chairman—and I know you share this view—I also recognize that American citizens are often deprived of their basic constitutional rights when they are in foreign countries. There is no question about that.

Several thousand Americans are arrested every year overseas. Some have committed criminal acts, and I don't have very much sympathy for them. A number of others have not committed criminal acts, yet they are falsely arrested and imprisoned.

We have an episode in Spain right now which is a puzzler to me. The latter, the innocent, are often victimized by the legal systems of other countries which, inevitably, are inferior to our own. And I say that advisedly.

Now, four MLATS are already in effect. Six other treaties are before us today, as you know. It is my understanding that seven more MLATS are in the pipeline.

That is why I feel one should be extremely cautious about the precedents we may be establishing and the direction we may be taking.

One of the basic things that gives me some heartburn, for example, is that these MLATS treaties appear to be self-executing. Maybe our distinguished visitors today will comment on that.

Now I don't like self-executing treaties. I am suspicious of them, especially in the area of criminal law and criminal procedure.

Treaties which make law are not a good idea.

I am aware that Chief Justice John Marshall, in the twilight of his great career, ruled that treaties are self-executing. But I also know that John Jay, the first Chief Justice of the United States, clearly indicated in the Federalist Papers that treaties were not to be self-executing.

Now, I realize that the administration conceives of the MLATS as standardizing criminal procedures on an international basis. And I do not object, in principle, to assisting other countries in their criminal proceedings when the object is to fight international crime. But the rights of the American citizens must come first. Who knows, you might be over there yourself one of these days, and certainly U.S. constitutional protections must be preserved.

Now, along these lines, Mr. Chairman—and I will wind up in just a moment—let me summarize the concerns that I raised at our business meeting about a month ago.

First, many MLATS combine civil and criminal matters. Now, this may have the effect of reducing individual safeguards in the implementation of these treaties. We need to know.

Second, foreign governments have made far greater use of the four MLATS already in force than has the United States Government. I have some concern—and maybe we can discuss that—I have some concern that we may be flooded in the future by applications from foreign governments to deal with individuals who may have tax shelters in the United States, which are not considered legal by the governments overseas.

Third, this leads to a greater concern about the lack of double criminality in four of the six treaties before us, especially the treaties with Canada, Belgium, and Thailand, all of which specifically excluded double criminality. Double criminality is a basic norm in international law when dealing with extradition matters, and it should also apply to legal assistance treaties, in my judgment.

Fourth, MLATS have been used as a fising expedition for wholesale discovery of evidence, but Americans accused of criminality by foreign governments are denied the use of the MLATS to procure documents for their own defense.

Fifth, MLATS do not provide for cross-examination of witnesses in the authentication of documents, as required by the Sixth Amendment of the U.S. Constitution.

Sixth, Safe conduct is not guaranteed to potential witnesses so that written depositions are utilized in place of individual testimony, which is guaranteed by the United States Constitution in the Sixth Amendment.

Seventh, and finally, I don't see any requirement of probable cause in the search and seizure provisions of these treaties, particularly with respect to the proposed treaty with Mexico. I don't see in these provisions any role for the courts in determining that probable cause. I don't see any protections for third party interests.

Now, I favor the lawful right of government to search and seize items of criminality under the Fourth Amendment, and it seems to me that the treaties are replacing—replacing—the role of the courts in this regard.

Now, there are other concerns which I may indicate in the questions I am prepared to ask of the witnesses, Mr. Chairman. Maybe we can file some written questions.

I think we ought to explore all of these things to be satisfied that we are doing the right thing and the proper thing and the smart thing.

My major concern is that all treaties, and especially these treaties, should be made to conform to the Constitution of the United States. The guarantees provided under our system of government should be granted to our citizens wherever and whenever the United States is involved in a criminal proceeding.

I don't like arbitrary and capricious legal systems—for example, that of the Government of Mexico—intruding upon the constitutional rights of an American citizen.

I appreciate the testimony and I certainly appreciate these three distinguished gentlemen coming here this morning, and I thank the Chair for his indulgence for my being late.

Senator KERRY. No indulgence was necessary. Thank you.

Why don't you proceed with your questions.

But first, Senator has joined us.

Do you have any opening comment at all, Senator Adams?

Senator ADAMS. No, thank you.

I will wait to ask my questions.

Senator KERRY. Senator Helms.

Senator HELMS. As I was about to say, the Chairman, in his typically thoughtful way is trying to help me do a balancing act between two Committees and he has suggested that I proceed with some of my questions. I will do that.

Mr. Zagoris, I believe the Justice Department says that individuals can sue letters rogatory, which I understand to be a request for assistance from a court of another country; but the MLATS are the result of the United States deciding that the letters rogatory were not satisfactory for U.S. prosecutorial needs because they were too slow in obtaining information.

Now, I think I am correct that it generally takes about six months to process and trials can start in three months thereafter.

My question is, Why should American citizens accused of a crime by foreign governments be stuck with a process that the Justice Department itself has called 'cumbersome and ineffective?

Mr. ZAGARIS. My response is that they should not.

The defendants in transnational criminal cases should have the same right to get at the evidence that they have in U.S. criminal cases, domestically. Our whole system is designed to get at the truth. And once you provide an unequal access to criminal defendants than you do to prosecutors, this balance is going to shift, and we will have more difficulty, both in getting at the truth and also the fair balance that our Constitution requires I think will also be diminished.

And so, I thing it is essential that criminal defendants in United States Courts have just as much right to get at evidence which is

going to be used in court. Courts will determine when a criminal defendant should be able to use the evidence.

So I think there will be sufficient safeguards that will be provided if this Committee and the Senate, when they ratify these treaties, insert into the language an understanding that the fact that private parties are not allowed to use the treaty does not mean that criminal defendants can use the treaty when courts approve.

Senator HELMS. Mr. White, you seemed a little concerned about that answer. Do you have any comment on it, or Mr. Pisani?

Mr. WHITE. Yes, I do, Senator.

I think what we are talking about here, essentially, as I understand the argument, is that at least defendants should have a right under rule 15——

Senator HELMS. Mr. White, will you pull your microphone a little bit closer.

Mr. WHITE. Yes; That at least defendants have a right under rule 15 of the Federal Rules of Criminal Procedure to take depositions of necessary witnesses in foreign countries.

But, certainly, as to the scope of other assistance under the treaties, that is, where searches and seizures are conducted at the request of the U.S. Government or by another foreign government under the treaty, under our present law, certainly that kind of assistance is not available to defendants at the investigatory stage.

So, if we limit this to merely the kinds of assistance that he is talking about, that Mr. Zagaris mentioned, in seeking deposition testimony, yes, there is a question. However, if you will recall, in the existing treaties that are in force now, particularly the most recent one with Italy, that treaty has a provision limiting the use of the treaty in all respects to the parties and among law enforcement authority.

The Swiss Treaty is silent on the issue. The other treaties that the Senate has ratified—the one with Morocco, which has not been ratified yet by Morocco; the Colombian Treaty, which has not yet been ratified by Colombia, but both of which have been consented to by the Senate—both of these have similar provisions, limiting access only to the parties.

It was the conception in the very beginning that these kinds of law enforcement tools would be limited to the parties, the governments, the law enforcement authorities of each.

It is suggested that this raises a serious constitutional problem. I suggest that this is not so. I think the Department of Justice should be given an opportunity to give a more fully developed response to this question. But, on practical terms, and in terms of any reservation that the Senate might insist upon, I think it would destroy these treaties.

I don't think that our treaty partners would agree. I think it would be viewed as an amendment of the treaty, and I think we would be in a state of limbo.

But, apart from that, there are pragmatic difficulties. The Office of International Affairs, which is the central authority under the treaty, helps prosecutors prepare their requests to the foreign governments so that the treaty respect will be adequate in all respects. Imagine, if you will, a system under which both defendants and prosecutors are asking the same body of attorneys in the Depart-

ment of Justice, who administer the treaty, to make requests of foreign governments and to receive the evidence.

I see enormous conflicts in trying to assist both defendants and prosecutors. The problems of the prosecutors having access to defense information. These are conflicts that are inherent in such a conception.

These provisions have worked well in the existing treaties. As my colleagues here have suggested, there is perhaps very little litigation, very little case law on most of the provisions of these treaties. But what case law does exist, to my knowledge, generally supports almost every existing provision.

I am not aware there has been any litigation on this particular issue. But, certainly, this provision will be scrutinized carefully by the courts. I presume that it will go all the way to the Supreme Court. It is my own personal view that this is not a Sixth Amendment problem, that it will not take away the letters rogatory rights, the coposition rights. Rule 15 is still available to defendants.

The other types of assistance, it seems to me, are not necessarily required. They are not required under domestic law. The FBI does not conduct investigations for defendants, and that is basically what the major requests under most of these treaties involve, the investigatory stage—certainly at the trial stage. But much greater emphasis is at the investigatory stage, where in the U.S., there is definitely a dual track system, where the FBI and all the agents, they don't conduct investigations of searches and seizures for defendants or issue subpoenaes for defendants.

Senator HELMS. This is an important point.

Mr. Zagaris, did you want to respond?

Mr. ZAGARIS. Yes.

The only thing that has been proposed in my statement and that of others it that at the trial level, if a trial court believes that there is either testimonial evidence or documentary evidence that is available abroad that would determine the truth of the litigation, that regardless of what side wants it, both the defendant and the prosecution should have a right to it.

The so-called conflict would be decided by the requested country turning the documents over to the court or to the prosecution for use by the courts. And so, there does not have to be this conflict.

I mean, inherent in any litigation is an adversarial system, and that is even more reason why defendants should have an equal chance.

He says that the defendants an use letters rogatory. Well, the letters rogatory are so inefficient that the government, when they testified in the first hearing, you can recall spent most of its time telling you how the letters rogatory just don't work.

And so, the same rules should apply when the case is being litigated, not in the investigatory stage, so that the defendants have an equal chance, and so that the court has a chance of getting at the truth.

Senator HELMS. Mr. Chairman, I am fascinated with this. Is my time up?

Senator KERRY. We are running an open hearing here.

Senator ADAMS. Mr. Chairman, if I could have a moment to ask a couple of questions, I have a little bit of time constraint.

Would that be all right with you, Senator?

Senator HELMS. Sure.

Senator ADAMS. Gentlemen, would you explain something to me.

I have had some experience with English parliament blocking statutes with regard to the antitrust laws, with tax law treaties and practice involving the Cayman Islands and attempts to obtain the information from the banks in the face of their laws. I am not entirely unfamiliar with it. But I do not understand and would ask one of you to please explain to me whether these MLATS are meant to substitute and establish a single international regime for the presently existing tax statutes, our subpoena duces tecum system, and the other methods now used to obtain evidence from abroad. In other words, are they to try to stabilize—"stabilize" is the wrong word—to standardize the procedures between companies and countries, or are they directed specifically at trying to do something about the narcotics trade, which is a relatively new laundering operation compared to the tax evasion statutes and the extraterritorial reach of the United States antitrust statutes?

I am familiar with the proposed treaties and I have tried to piece through in your testimony those that are both in effect and are being proposed. But from your testimony, I cannot tell whether these are going to be preemptive of existing statutes, standardized, or what. What is your testimony on the effect of them?

Mr. White, you have been involved with this as Director of the Office of International Affairs of the Criminal Division of the Department of Justice. Do you want to proceed here.

Mr. WHITE. Senator Adams, you have asked a lot of questions.

Senator ADAMS. Well, I just prefaced myself so that you did not have to start me at Ground Zero, but indicated I also was not at the apex of international enforcement of criminal statutes. That is the only reason I mentioned those things.

My question really is, Do you consider these are substituting for the existing systems we use to standardize it, or do you consider them a new tool to be used for, say, the international laundering of narcotics money?

I guess that gets me to where I want to be.

Mr. WHITE. Let me make some distinctions first.

When we are talking about the treaties that are before this Committee, the mutual legal assistance treaties in criminal matters——

Senator ADAMS. I understand that. But I am talking about tax evasion fraud cases, antitrust fraud cases, because Justice usually tries to reach—I mentioned antitrust because in Europe, they have an entirely different system. They don't consider it criminal. They have bank secrecy laws that run into the International Revenue Service's desire to obtain documents from a bank in order to proceed with a criminal matter.

I just want to focus on those and do not want to get into all of the civil matters.

Mr. WHITE. Yes. You mentioned tax treaties and I just wanted to make the distinction between criminal assistance in criminal cases and tax treaties, which are civil in nature. So that is a separate track. The tax treaties deal only with assistance in civil tax matters.

These treaties, which are criminal, also seek to obtain evidence for us in tax evasion cases, tax fraud cases, tax shelter fraud cases.

The breadth of these provisions is such that it covers most major crimes in both countries, and we can mutually give each other assistance.

In the tax area, that has been a particular problem with certain of the Caribbean tax secrecy jurisdictions, namely the Caymans, which you mentioned, and the Bahamas. They do have strict bank secrecy laws. They don't like to pierce those laws. It is a major part of their economy, as you know.

They have made major concessions in these treaties to give us evidence, even in certain tax crimes which are generally outside the pale of assistance.

The Caymans have, in effect, said we will give you evidence in narcotics cases, in bribery cases, the whole breadth of cases. But when it comes to tax, they have gone very far and, in effect, give us assistance in everthing but what they determine to be a pure tax case, which is a very rare species indeed. When I say that, I mean if it is an honest businessman in this country who is secreting his money in the Cayman Islands in violation of U.S. law, it is still not going to be open to us to obtain evidence in that kind of tax case, either from the Bahamas or from the Cayman Islands.

It is something that we wanted to include in the treaties; but, as a practical matter, that is one barrier that will not be broken down by these treaties.

But virtually every other tax area, if it is a person who has acquired his income in this country by illegal means and it involves a tax case, they will provide us that kind of evidence.

So, if it is money derived from drug trafficking, from corruption, from fraudulent practices and the U.S. is trying to make a tax case, if it is a tax shelter fraud case, which obviously includes the word "fraud," they will give us that kind of assistance.

This is a major breakthrough, Senator, in these particular jurisdictions, the so-called tax havens.

Now, that answers part of your question. There are two tracks. On the civil side there are the tax treaties, which is an ongoing process; then, on our side, of cource, it is the breadth of assistance in virtually all crimes that are felonies, and certainly with the Caribbean jurisdictions, you know, to get the drug traffickers and to get them by any means, including tax evasion charges.

Mr. ZAGARIS. May I supplement that?

Senator ADAMS. Go ahead.

Mr. ZAGARIS. I agree with Mr. White that these MLATS are a breakthrough. The reason we began to negotiate them had to do with the series of international conflicts over the subpoenas of records from especially Cayman and Bahamian banks.

Initially, we got them to sign a single protocol to the narcotics agreements. And then, after another two years of very intensive negotiations with the Bahamas—we had about seven or eight negotiations over a three year period—we were able to come out with these MLATS which are expanded to include not only narcotics but many other crimes as well.

However, the treaties with both the Bahamas and the Cayman Islands still exclude fiscal, customs, and currency types of cases. But, they nevertheless are a breakthrough.

There is right now the OECD Mutual Assistance Convention on tax matters, which is up for ratification, and the United Kingdom, if they ratify that, can do so on behalf of the Cayman Islands.

So, with respect to achieving more cooperation in criminal and civil tax matters with the Cayman Islands, the best bet we have is the OECD Treaty.

These treaties also do not provide that they are the exclusive and only means by which we can get assistance. And so, in that regard, they are also I think an important breakthrough.

Senator ADAMS. Well, the general system that has been used—and that is why I inquired about it—is that if you were in civil matters—and that is why I wanted to separate those from these—and you had a potential criminal subpoena duces tecum on where he was doing business, here in the United States, and thus attempted to force it through their bank account or wherever, by getting the documents in that fashion—and that was the way that people went around it—I just tried to get in mind how and what you are using these for.

In the Cayman Islands, for example, you are right that the U.K. Foreign Office has charge of their foreign affairs and, therefore, must negotiate these. But I assume that both had signed off on these MLATS that you have. I just happen to know something about the Caymans, as opposed to some of the others and I know that they have cooperated in criminal cases, in bribery, and so on, but not in tax matters. That was what I was just trying to figure out.

These are extensions, as I understand it, Mr. Chairman, of criminal jurisdiction but are not exclusive remedies, but will be used, I assume, by those countries to say that this is the way you should proceed if you want either documents or a person or you want to question on our territory.

Senator HELMS. Would the Senator yield?

Senator ADAMS. I would be happy to yield.

Senator HELMS. I don't have any problem with a lot that has been said. Breakthrough—fine.

Now, you have been silent, Mr. Pisani, and have not been asked a question next, so I am going to focus this next one on you. The Italian MLAT, for example, which is already in force, does not give the individual detainee the option to decline to testify, isn't that right?

Mr. POSANI. Yes, that's correct.

Senator HELMS. Is this not true—I will ask of you all—is this not the case with the other MLAT treaties before us right now?

Now, we are talking about the Fifth Amendment. Do we believe in the Fifth Amendment? It is in our Constitution and I hope it stays there.

Now this is the point that I am making, Senator Adams, and I wish the witnesses would straighten me out on that if I am wrong.

Mr. PISANI. Let's take an example. If an individual who was in Italy were being deposed by the Italian authorities in assistance with the U.S. Government and stated that he had a Fifth Amendment right, under the terms of the treaty, the people taking the deposition would have to take note of that fact and bring that to the attention of the authorities in the United States. However, they would be permitted to go on and take the testimony. That is how the treaty operates.

The Italian Treaty also has an international subpoena, whereby an individual could be required to testify and, if they did not, they would be subject to the same sanctions as if they refused to testify under the laws of the requested state.

So, the Italian Treaty is a bit of an anomaly. It has a special provision for an international subpoena that is in it.

Senator HELMS. Well, I don't think anybody would want to modify the U.S. Constitution with respect to the Fifth Amendment. They would just "take note" that he does not want to testify.

Mr. WHITE. May I respond to that, Senator?

Senator HELMS. Mr. Chairman, this intrigues me.

Senator KERRY. Yes, and this is what we want to get at.

Mr. WHITE. The treaties in virtually every case, allow the assertion, when the U.S. makes a request to Italy, say, under the Italian Treaty or under another treaty, they allow the assertion of privilege by a witness in that country, whether he is an American, a foreign national, an Italian, or whatever, they allow him to assert privileges under the law of the requested country—Italy, Switzerland, whatever.

Many of those countries do not have a Fifth Amendment privilege akin to ours.

Senator HELMS. That's the point.

Mr. WHITE. The United States has a choice at this point. He will certainly raise the privilege and the testimony will probably then be taken, but subject to the proviso that the privilege will have to be adjudicated by a U.S. court at the time of criminal proceedings. I assume that the court will reexamine the validity of the Fifth Amendment claim and will make a ruling, such as it makes in a domestic case, and either require that testimony to be used or not.

So, in my view, it is not detracting from the constitutional right of the Fifth Amendment. It is simply that an adjudication will be made in this country at the time of the criminal procedure.

Senator ADAMS. Senator, may I just inquire on that point?

Senator HELMS. Surely, but I am going to have to leave.

Mr. Chairman, might I submit some questions in writing to these witnesses?

Senator KERRY. Of course. The record will remain open for two weeks or so.

Do we need to move forward on this? What is our schedule? Is that too long a time period?

Senator HELMS. I do want to thank all three of you. It has been most interesting and helpful to me.

Senator KERRY. We are going to leave the record open for about 4 or 5 days because of our schedule and our desire to move forward, for submission of questions in writing.

Senator HELMS. Thank you.

Senator KERRY. Thank you very much.

Senator Adams, had you completed your questions?

Senator ADAMS. Mr. Chairman, I just have one question on that point.

Mr. White, we do not apply "renvoir" in this, do we?

Mr. WHITE. I beg your pardon, Senator?

Senator ADAMS. We do not apply "renvoir" to the criminal statute? What you really have is criminal discovery because very few places in the world have a Fifth Amendment, and, therefore, you have criminal discovery, which I gather is the point that is being made. We do not apply "renvoir" to that?

Mr. WHITE. I'm sorry, Senator, but you've got me on "renvoir."

Senator ADAMS. It's the mirror image that we use in the foreign jurisdiction, where the state that has the jurisdiction uses the law of the country from which the request of the matter is being determined and reflects that law. That's all. It's just the mirror image principle.

Mr. WHITE. No, we do not.

Senator ADAMS. You do not.

Thank you, Mr. Chairman.

Senator KERRY. Senator McConnell, do you have any questions?

Senator MCCONNELL. No, Mr. chairman. I just arrived. I am going to have a statement for the record, but I do not have any questions.

Senator KERRY. Let me just ask a quick question.

Mr. Pisani, were you involved in the Conan David Owen case at all?.

Mr. PISANI. We have been advising the family informally almost since its inception. Yes.

Senator KERRY. If we had an MLAT treaty with Spain along the lines of the treaties that we are talking about here, would that have made a difference in the outcome of that case, in your judgment?

Mr. PISANI. The treaties are used to investigate criminal matters. I think that you could have made a claim that, under the treaties, information about the cases could have been exchanged on a level between the Ministry of Justice of Spain and the Department of Justice here.

There was no formal investigation that I am aware of that the Department of Justice was conducting of Conan Owen's activities. However, I think, under the terms of the treaties, certainly information could be exchanged, and there was a series of very crucial exchanges of information made when Attorney General Meese went over there and brought evidence that an individual here had been convicted of drug traffic and had, in fact, claimed that he had set up Mr. Owen.

I think this was an important piece of information and Attorney General Meese actually went over and presented it. Under the terms of the treaty, certainly the communication channels would have been very open to present that information.

Senator KERRY. Mr. Zagaris or Mr. Pisani, are either of you recommending a specific reservation or understanding that should be attached to these MLATS?

Mr. PISANI. I am at least suggesting that the Senate take the position that the treaties themselves, that the Senate should have some way of overseeing the treaties in general.0

Let me note from my statement exactly what I said. I think that the Committee should take steps to permit defendants access to the treaty. I think somehow there should be some statement by the Senate that individuals should have a right to use the treaties, either by an exchange of notes or by some statement by the Senate that "private parties" excludes criminal defendants.

Senator KERRY. As a matter of understanding or reservation?

Mr. PISANI. Yes.

Mr. ZAGARIS. Senator Kerry, I would say that the most efficient way to do its, and the way to get the treaties ratified and in force right away, would be merely an understanding in the ratification, as I have mentioned on page 4 of my testimony. That would enable all the treaties to go into effect right away, but yet to still allow access where needed to criminal defendants.

Mr. WHITE. Senator Kerry, may I respond to that?

The problem that I see with that is, while that may be the understanding of the United States, that is not binding on our treaty partner, who will likely not allow access by private parties.

So I think it is a fundamental change.

But let me suggest something else. Under the Swiss Treaty, which I mentioned earlier—it does not speak to this question, but I think at the time it was the understanding of the negotiators that this was not going to be available to anyone other than the parties—under that treaty, there have been occasions when the court has ordered the government to make, in exceptional cases, as under the criteria of rule 15, in exceptional cases, in the interest of justice, the court has ordered the Department to make a request in behalf of a particular defendant. I can only recall one or two cases where that has happened, and the government has acceded.

I can see, perhaps even in these six treaties, where it specifically stated that access is not allowed to any other than parties, that if a court should order the government to nevertheless make a request, under the standards I have articulated under rule 15—and I am not speaking for the Department of Justice here—but I can conceptualize the Department looking at that as law enforcement assistance, and, under that rubric, would probably concede to making a request.

But I think it has to be understood, and should be understood, that, just as rule 15 access is limited, and it has to be of a party's own witness—it can't be for discovery; it has simply to be to get evidence of a party's own witness—that the court could probably order it. That would solve the problem.

But I do think that on a wholesale basis, to suggest that the treaty has to be open in all respects to both the parties and defendants would really severely inhibit the usefulness of the treaty.

Senator KERRY. Senator Sanford, do you have any statement that you would wish to make, or questions, at this point?

Senator SANFORD. I don't wish to put any statement in the record, but at the appropriate time, I might ask a question.

Senator KERRY. Well, there is no time like the present.

Senator SANFORD. I don't want to get them off on the Fifth Amendment. I take it that the Fifth Amendment applies when we get them back to this country, anyhow.

Mr. WHITE. That it correct in my view, Senator.

Senator SANFORD. Well, I understand, Mr. White, that the primary objectives, or one of the primary objectives, in selecting four of the countries—the Bahamas, the Cayman Islands, Mexico, and Thailand—was to aid our efforts to combat drug trafficking and related offenses, such as money laundering and trafficking and such, by giving our prosecutors access to critical financial and banking records located in those countries for purposes of U.S. prosecutions. And if these treaties, particularly those with the Bahamas and Cayman Islands, should not be ratified, do you have any thoughts on the consequences in terms of our law enforcement strategy, our drug law enforcement strategy? What are the implementations there?

Mr. WHITE. Yes, Senator Sanford, I do.

I think the drug enforcement effort has driven particularly the treaties with the Bahamas and the Caymans. We have pushed those jurisdictions very, very hard and very far to break down their walls of financial and banking secrecy.

As you know, the Bahamians have already enacted implementing legislation which would give life to all of these provisions. It will give us the evidence we need in the most serious drug cases. The Caymanians, as well, have passed implementing legislation, and, in effect, did it long ago, and are sitting there very anxiously, under an existing drug agreement that is executive in nature and is not reciprocal—they get no benefit from this—they are waiting for us to endorse the treaty, to have it approved, so that they, too, can use the treaty. Their needs will probably be limited. So they are sitting there feeling, you know, here is the Government of the United States pushing us very hard and here we are, two years later, still waiting to get these treaties approved.

But, apart from that, if they are not, after all of this trail-blazing work in getting both of these jurisdictions to make serious concessions in the area of tax evasion, particularly where it is related to unlawful activity, considering that they do not consider tax matters to be crimes, they have come a long way.

If the treaties are not in effect, then we are forced back, and it is a step backward, it seems to me, a serious step backward, because we will then be forced to use other alternatives. The only other alternatives, other than letters rogatory, which have had very limited utility, are such that we are then forced to go back to the use of subpoenaes, to put subpoenaes on Swiss banks, United Kingdom banks and Canadian banks, in particular, that are doing business in this country and who happen to have branch offices in the Caymans and the Bahamas.

Then we are going to be back in the terribly difficult position where foreign governments do not recognize our right. They call it an extraterritorial exercise of jurisdiction, and an infringement on their sovereignty. It will undo all of the work that we have done. It

will blunt efforts to do a similar treaty with the United Kingdom, which, I think, is using the Caymans as a stalking horse for where they should go.

So I think the effects would severely harm our drug interdiction efforts.

Senator SANFORD. Thank you very much.

Would either of the other witnesses care to comment on that, or is that beyond your interest.

Mr. PISANI. Well, I think the position—and I think I speak here for Mr. Zagaris—is that we support the treaties. The Department of Justice needs them. International crime and drug trafficking has increased dramatically in the past 15 years, and the Department of Justice needs this tool to go after the international criminals.

I don't think what we are requesting is particularly unreasonable. We are concerned about access to the treaty on the part of defendants. It would be a very limited access. I think, absent that access, there are real constitutional problems, compulsory process problems, that exist, and I think that it can be dealt with relatively easily.

I am not at all convinced that the treaty partners would throw up their hands in horror at the thought that defendants in limited situations would have access to the treaties.

Just in passing I would note that some of the treaties, the Colombian and Italian treaties, do limit assistance to those between government authorities. But I think this could include requests from the courts as government authorities. So I don't see a particular problem in that respect.

So, in summary, I think we need these treaties. I think we all support time. We are just asking for some very limited consideration.

Mr. ZAGARIS. I would also endorse Mr. White's statements about the importance of the treaties with respect to narcotics trafficking and money laundering, especially with respect to the Bahamas and the Cayman Islands.

There is one other thing that I will mention. In the first hearing, Senator Kerry asked some questions, about the fact that in the Bahamas, we have not always received the cooperation that we have wanted, and that we have some problems with the Bahamas Government, and therefore, why should we enter into another agreement with them.

I think the importance there is that it is necessary to have the Bahamian Government required under international law to cooperate, and, if they don't, I think that the international community will take action against them.

Also, even if one government does not cooperate, governments change, so it is important to have the legal instruments to require future governments to cooperate with us.

So, I wholly endorse the importance of these agreements that Mr. White has mentioned.

Senator SANFORD. Thank you very much.

Mr. Chairman, I don't have any other questions.

Senator KERRY. Thank you very much, Senator Sanford.

I am going to leave the record open for four to five days, as I said. We will submit some questions in writing to you. I have a few that we also want to follow up on.

But I think it has been helpful to hear this from your perspective. Hopefully, we will be able to move forward on these. We will certainly consider the suggestions that you have made, and Mr. White, obviously your point of view with respect to any understands, et cetera, as well.

I am not sure that that is the way to proceed, but we will make our judgments on it.

So, the record will remain open, and, on that note, this hearing is adjourned.

[Whereupon, at 11:21 a.m., the hearing was adjourned.]

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August 15, 1988

The Honorable Clayborne Pell
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510-3902

Dear Mr. Chairman:

I write to commend you and your committee members for conducting a recent hearing on a number of pending mutual legal assistance treaties (MLATS). It is the view of the American Bar Association that such mutual legal assistance among nations in criminal matters is essential to foster the uniform and cooperative international enforcement of laws.

To highlight the American Bar Association's commitment to your effort, I enclose a copy of the resolution adopted by the American Bar Association's policy-making House of Delegates in February 1987 supporting ratification by the United States of the Treaty Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters (Treaty Doc 100-8), signed July 3, 1986. I would appreciate your including this letter and enclosure in the formal record of your recent hearing of June 14, and I would reiterate the support of the American Bar Association for prompt action on this matter.

Most cordially,

Craig H. Baab

CHB mlc

Enclosure

cc: Mr. Joseph Griffin
Mr. William Hannay
Mr. Courtney Evans
Mr. Steve Nelson

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AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW AND PRACTICE

REPORT
TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association supports ratification by the United States of the Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, signed July 3, 1986.

REPORT

1. The purpose of this report is to analyze the provisions of the U.S. - Cayman Islands treaty relating to Mutual Legal Assistance in Criminal Matters, signed at Grand Cayman, Cayman Islands on July 3, 1986. The treaty has not yet been formally transmitted by the President to the Senate. A copy of the treaty and an accompanying exchange of diplomatic notes is attached hereto (incl. 1).

2. Background: As one newspaper has recently noted, the Cayman Islands and other Caribbean islands with strict bank secrecy laws have been viewed for several years as "a thorn in the side of United States law enforcement officials, who have complained that drug traffickers, money launderers, and white-collar criminals have been able to hide their illicit profits in accounts in banks on those islands." New York Times, Section D, p. 10, Col. 2 (July 4, 1986). For example, one U.S.

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businessman organized and supervised the laundering of a $2.7 million kickback fund through an elaborate network of secret bank accounts in various countries, including one in the Cayman Islands. United States v. Davis, 767 F.2d 1025 (2d Cir. 1985). When U.S. prosecutors subpoenaed records from the Cayman Islands bank, the defendant instituted litigation in that country under its bank secrecy laws preventing the bank from supplying any records for more than a year. Id. at 1032-33.

3. The mutual assistance treaty signed July 3, 1986, was the result of three years of negotiations between U.S. and Cayman Islands' officials. Its obvious intent is to balance the U.S. Goverment's interest in more effective enforcement of its criminal laws against the Cayman Islands' desire to maintain its attractiveness to the financial community by protecting investors' privacy.

4. The United States has four mutual assistance treaties currently in force: with Switzerland, Turkey, the Netherlands, and Italy. A detailed comparative analysis of the contents of those four treaties was recently published in The International Lawyer, Vol. 19, No. 1 at pp. 189-223 (Winter 1985). The Cayman Islands treaty is generally similar to these other treaties. Where it varies in significant degree, the differences are understandable in light of the treaty's background.

5. Like the earlier mutual assistance treaties, the Cayman Islands treaty authorizes a wide variety of assistance between the two countries. Specified assistance includes taking of testimony, providing documents and records, locating persons, executing requests for searches and seizures, and immobilizing criminally obtained assets (Article 1.2). The treaty leaves the list of assistance flexible by permitting under Article 1.2(i) "any other steps deemed appropriate" by both parties. Cf. Barr v. U.S. Department of Justice, No. 86 C 2447, slip op. at 3 (E.D. N.Y., filed October 15, 1986) (assistance under Swiss treaty not limited to specified activities).

6. Also like the earlier treaties, the Cayman Islands treaty does not create "any right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request" (Article 1.3). Case law makes clear that signatory states to a treaty may confer judicially enforceable rights on individuals in the treaty or preclude them as the states see fit. See United States v. Davis, supra, 767 F.2d at 1030 n.9. Where, as here, no such rights are granted,

individuals lack standing to compel or to challenge activities under the treaty. Id. at 1030.

7. Private parties continue to have available other forms of discovery, such as letters rogatory. See Pustok v. Banque Populaire Suisse, 546 F. Supp. 506 (S.D.N.Y. 1982). Some concern, however, has been expressed that forcing criminal defendants to utilize the much slower procedures of letters rogatory, while allowing U.S. law enforcement agencies to utilize the treaty's quicker provisions, offers the prosecution an unfair advantage. E.g., 19 International Lawyer at 221. Restricting direct access to the treaty's mechanisms to the party states is an appropriate and efficient structure for a bilateral treaty, particularly one that is intended to remove a serious block to prosecution of crimes. The current U.S. practice is apparently for the government to make requests under mutual legal assistance treaties on behalf of the defense upon a showing of necessity and where the court so orders. See 19 International Lawyer at 222 n.181. This approach is acceptable and provides a reasonable balancing of interests between the government and the defendant.

8. The purpose of mutual assistance is restricted under the Cayman Islands treaty to "the investigation, prosecution, and suppression of criminal offenses" as the latter term is defined in Article 19.3. Article 19.3(a) employs the principle of dual criminality in defining a "criminal offense" as any felony that is a crime in both countries; however, Articles 19.3(b) through (k) list a number of financial and other crimes for which assistance is authorized without regard to their criminality under Cayman Islands law. These offenses include racketeering, insider trading, securities fraud, foreign corrupt practices (such as bribing foreign officials), and failing to report the international transfer of currency which constitutes the proceeds of a criminal offense.

9. Not surprisingly, in light of the Cayman Islands' history and concerns, the treaty expressly excludes from the definition of a criminal offense "any conduct or matter which relates directly or indirectly to the regulation, imposition, calculation or collection of taxes" (Article 3.1). Nevertheless, the treaty does authorize assistance in prosecuting two types of tax-related crime: fraud connected with income tax shelters and false statements on tax returns with respect to unlawful proceeds of other crimes covered by the treaty. Compare Article 3.1 with Article 19.3(d) and (e).

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10. The Cayman Islands treaty contains special provisions relating to exclusivity of assistance (Article 17). While acknowledging that assistance may be granted pursuant to any other applicable "international agreements or arrangements," the treaty prohibits any party from enforcing any "compulsory measure, including a grand jury subpoena," to obtain documents unless that party's obligations under the treaty have been fulfilled (Article 17.1, 17.3). The treaty establishes in certain cases a time limit of 90 days for the requested party's fulfillment of its obligations (Article 17.4). Article 17 reflects the parties' unhappy experience in connection with United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982) ("Nova Scotia I"), and 740 F.2d 817 (11th Cir. 1984) ("Nova Scotia II"). In that case, U.S. law enforcement officials subpoenaed the Miami branch of the Bank of Nova Scotia for records of its Cayman Islands affiliate. When the bank refused to produce the documents, a U.S. district court levied a $1.8 million fine against the bank, which was later upheld on appeal.

11. One other provision of the Cayman Islands treaty differs somewhat from earlier treaties. Pursuant to Article 3.2(c), the requested party may deny assistance if the request does not "establish that there are reasonable grounds for believing: (i) that the criminal offense specified ... has been committed; and (ii) that the information sought relates to the offense ...." Such a provision again is not surprising given the Cayman Islands' concern for protecting the privacy of investors and for allaying concerns about opening bank records to mere "fishing expeditions."

12. The Cayman Islands treaty is of significance as a model for mutual legal assistance treaties with other Caribbean islands with similar bank secrecy laws. Pursuant to a protocol agreed to upon the signing of the treaty and made an integral part of the treaty, the terms of the Cayman Islands treaty may be made applicable in whole or in part to Anguilla, the British Virgin Islands, Montserrat, and the Turks and Caicos Islands by Exchange of Notes between the U.S. and the United Kingdom. Similar treaties are in the process of negotiation with Jamaica and the Bahamas.

CONCLUSION

The mutual assistance treaty with the Cayman Islands represents a valuable step in eliminating barriers to effective law enforcement in the Caribbean and is consistent with other

such treaties previously signed by the United States. The treaty should be ratified by the President with the advice and consent of the Senate.

Respectfully submitted,

Robert S. Rendell
Chairman

February, 1987

EMBASSY OF THE
UNITED STATES OF AMERICA

No. 41

The Embassy of the United States of America presents its compliments to the Foreign and Commonwealth Office and has the honor to refer to the Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters (hereinafter "the Treaty"), which is being signed this day at Grand Cayman, Cayman Islands by representatives of the Governments of the United States, the United Kingdom and the Cayman Islands.

In the spirit of cooperation, mutual respect and good will existing between the Government of the United States and the Government of the United Kingdom, including the Cayman Islands, concerning mutual legal assistance in criminal matters, the Embassy proposes that, in the interests of facilitating the cooperative use of the Treaty with respect to criminal offenses that fall within its scope and of avoiding measures that could result in a conflict between our respective laws, policies or national interests:

1. The Contracting Parties shall continue to exercise centralized control and carefully screen and evaluate matters that may involve potential areas of conflict and shall consult in good faith, at the instance of either Contracting Party, with respect to such areas.

2. Each Central Authority shall be free to invoke at any time assistance of the Contracting Parties for the purpose of resolving any differences that may arise in connection with the implementation or interpretation of Article 17 of the Treaty.

3. Even in those cases in which the Parties' obligations under Article 17 have been fulfilled with respect to a particular request, each Party shall continue to exercise moderation and restraint in considering the enforcement of unilateral measures to which the other objects for the production or withholding of evidence.

4. Each Central Authority undertakes to discuss with the other any case brought to its attention involving an exercise of jurisdiction with respect to criminal matters which may result in the production of evidence located in the territory of the other Party, with a view to resolving any differences in a mutually satisfactory manner.

It is understood that this Note and any reply do not create any legal obligations; nor do they create any rights on the part of a private person to obtain, suppress, or exclude any evidence or to impede the execution of a request with respect to assistance that may be available under the Treaty.

The Embassy of the United States avails itself of this opportunity to renew to the Foreign and Commonwealth Office the assurances of its highest consideration.

Embassy of the United States of America

London, July 3, 1986

The Foreign and Commonwealth Office presents its compliments to the Embassy of the United States of America and has the honour to refer to the Embassy's Note of today's date which reads as follows:

"The Embassy of the United States of America presents its compliments to the Foreign and Commonwealth Office and has the honor to refer to the Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters [hereinafter "the Treaty"], which is being signed this day at Grand Cayman, Cayman Islands by representatives of the Governments of the United States, the United Kingdom and the Cayman Islands.

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The Embassy of the United States avails itself of this opportunity to renew to the Foreign and Commonwealth Office the assurances of its highest consideration."

The Foreign and Commonwealth Office confirms that the proposals set out in the Embassy's Note are acceptable to the Government of the United Kingdom and the Government of the Cayman Islands.

The Foreign and Commonwealth Office avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

Foreign and Commonwealth Office
London, 3 July 1986

STATEMENT

OF

MARK M RICHARD
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

CONCERNING

MUTUAL LEGAL ASSISTANCE TREATIES

ON

APRIL 20, 1988

Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on the five mutual legal assistance treaties which have been referred to the Committee -- treaties with Canada, Mexico, the Bahamas, Belgium, and with the United Kingdom concerning the Cayman Islands. My comments will also encompass our treaty with Thailand, which we understand may be submitted soon enough to permit the Committee to consider it along with the other treaties.

The Department of Justice participated with the Department of State in the negotiation of these treaties, and today joins the State Department in urging the Committee to report favorably on the Senate's advice and consent to their ratification.

Treaties designed to obtain evidence from abroad, which are commonly referred to as Mutual Legal Assistance Treaties, or MLATs, are a relatively new phenomenon. The first such treaty was our treaty with Switzerland, which entered into force in 1977. Since that time, MLATs with the Netherlands, Turkey and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step towards agreement on a more expansive mutual assistance treaty.

The negotiation and implementation of effective mutual legal assistance treaties and executive agreements is a very important aspect of our effort to investigate and prosecute serious crime. As this Committee knows all too well, we have in recent years seen the internationalization of serious crimes such as narcotics trafficking, money laundering, terrorism, and large scale fraud. As a result, it has become increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLATs is to provide a reliable and efficient means of obtaining this evidence.

Inasmuch as the Department of Justice has prepared detailed technical analyses of each of the treaties, I would like to speak today in more general terms about why we view treaties such as those now before the Committee as important instruments in effectively investigating and prosecuting serious offenses.

At the same time, it is important to note that these treaties are not panaceas. They will not resolve the problem of international crime, though they can be an extremely useful tool to that end. Moreover, how effective an MLAT ultimately proves to be depends as much on the good faith and commitment of the parties as it does the specific language of the instrument. It also requires that the parties have a frank and productive working relationship in implementing the treaty. Indeed, we have

come to view this process of consultation as so important to the effectiveness of our MLATs that we now seek to include specific consultation provisions in the texts of our treaties.

For the benefit of the members of the Committee, I would now like to briefly explain what an MLAT is and what we see as its primary advantages.

An MLAT generally can substitute for the use of letters rogatory in criminal cases. Letters rogatory are written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance needed in a judicial proceeding. Letters rogatory are used in both civil and criminal cases. Because we presently have only a small number of mutual legal assistance treaties and executive agreements in force, in the absence of an MLAT we use letters rogatory to obtain evidence when dealing with foreign countries.

However, MLATs provide, from our perspective, a much more effective means of obtaining evidence. First, an MLAT <u>obligates</u> each country to provide evidence and other forms of assistance needed in criminal cases. Letters rogatory, on the other hand, are executed solely as a matter of comity, more often than not by the judicial branch of the requested government.

Second, an MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale criminal activity such as narcotics trafficking and white collar crime.

Third, in an MLAT we have the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include, for example, the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. The rules of evidence that govern admissibility in our courts and even such basic aspects of our legal system as the opportunity for probing cross-examination of witnesses by defense counsel are, in large measure, unheard of in the majority of countries which have civil, rather than common law, legal systems. MLATs can establish a procedural framework for ensuring that the evidence we obtain will comport with our evidentiary requirements and be admissible at trial.

Fourth, our MLATs are structured to streamline and make more effective the process of obtaining evidence. Each of our MLATs provides for a Central Authority which is responsible for making and executing requests under the treaty. In effect, the Central Authorities are the Justice Departments of the two countries, and

they deal directly with one another on all treaty matters. For the United States, the treaties also always provide that the Central Authority can actually formulate the request for assistance. This means that all treaty requests may be made by the Department of Justice. Court-issued letters rogatory are consistent with the judicial conduct of criminal investigations in most civil law countries. This practice is, however, something of an anomaly in the United States where the investigation and prosecution of crimes is a function of the executive, rather than judicial, branch.

Comparing the way in which letters rogatory and treaty requests are made illustrates the virtues of treaty procedures. In the case of letters rogatory, an Assistant United States Attorney must apply to the district court for the issuance of letters rogatory and file a set of pleadings, including proposed letters rogatory. Once signed by the court, the letters rogatory must then be presented through diplomatic channels. This means it goes from the prosecutor to the Department of Justice, to the Department of State, to the appropriate U.S. Embassy, to the Ministry of Foreign Affairs, to the Ministry of Justice, and finally to the court which will execute it. This process requires the preparation of various letters of transmittal and instruction, cables, and diplomatic notes. The evidence obtained through the letters rogatory is then transmitted back to the requesting prosecutor through the same tortuous route.

The process for treaty requests is quite different. By regulation, the Attorney General has delegated his powers as Central Authority to the Criminal Division's Office of International Affairs. The prosecutor or investigating agent seeking the evidence works directly with the Office of International Affairs in preparing the request, and it is signed by the Director of that Office. The request is then sent directly to the Central Authority of the treaty partner, which will either execute the request, or refer it to the appropriate court or law enforcement agency for execution. The route for the return of the evidence is the same.

While each of the treaties now before the Committee shares the characteristics and goals I have outlined, the specific provisions of the treaties may vary. In some cases, the differences are semantic; in others they are substantive. But having certain substantive differences among the treaties is the inevitable result of bilateral negotiations over a period of years with six countries which have differing legal systems and domestic interests, and with which the United States has differing law enforcement relations and priorities.

The treaties before the Committee are, in part, a reflection of our present and past law enforcement relations and priorities with our treaty partners. For example, there is no country with which we have more extensive or more productive law enforcement cooperation than with Canada. With this foundation and the

advantage of a shared legal tradition, we expect our MLAT with Canada to be our most frequently and most effectively used treaty. On the other hand, we would be naive to expect that the MLAT with Mexico, which shares our southern border, could be as easily utilized. Mexico has a very different legal system, and those differences have shaped the language of the treaty as has our history of relations in the law enforcement arena. Moreover, Mexico has special sensitivities with respect to issues perceived to impact on its sovereignty.

Our priorities in combatting narcotics trafficking and money laundering contributed to our efforts to negotiate viable MLATs with the Cayman Islands, the Bahamas, Mexico and Thailand. In the case of Canada and Mexico, our shared borders and the resultant volume of criminal cases requiring bilateral cooperation were important factors. With Belgium, we had an opportunity to negotiate, in a rather short period, an MLAT with a European country that is major commercial and financial center, and in doing so, to set the stage for MLAT negotiations with neighboring countries with legal systems quite similar to those of Belgium.

From our experience with the treaties now in force, we have learned that MLATs can be an extremely valuable tool in obtaining the evidence we need to successfully prosecute major crimes. In the ten years since our treaty with Switzerland entered into force, we have refined certain of our positions on the many

issues that may arise in negotiating an MLAT, and we at the Department of Justice have learned much in the process of implementing our treaties.

The treaties before the Committee, like the MLATs now in force, represent an evolution in our positions in the mutual assistance field. Each treaty, too, is the product of a unique negotiating history. None is a perfect instrument. Thus, each MLAT is different from the next, and each is a complex instrument and reflect the peculiarities of our own and our treaty partner's laws and procedures.

Accordingly, we appreciate the considerable task the Committee faces in analyzing these MLATs. I would be pleased to respond to the Committee's questions, including any written questions the Committee may wish to pose after the hearing today.

Statement of Bruce Zagaris*
before the Senate Foreign Relations Committee
concerning Mutual Legal Assistance Treaties
June 14, 1988

At the request of the Committee, this statement discusses the six recently negotiated Mutual Legal Assistance Treaties (MLATs) which the Committee is now considering for purposes of giving its advice and consent. Rather than concentrate on broad analysis of U.S. MLAT or international criminal cooperation policies, the statement focuses on the recent controversies which have stimulated this hearing.[1]

I. INTRODUCTION

Because the United States currently only has five MLATs in force, the consideration of the six now pending before the Committee is important. Several of the governments with which the U.S. has concluded MLATs -- Mexico, the Bahamas, the Cayman Islands, and Thailand -- are important for solving narcotics and money laundering problems. For instance, the ability of the United States Government to forfeit Carlos Lehder's assets in the Bahamas depends on the proposed U.S.-Bahamian MLAT being in force.[2] Negotiations with these governments already have been long and difficult. Despite the problems which have been raised in some of the pending MLATs, the Committee should recommend ratification of them.

Indeed an internationalization of the administration of criminal justice is one of the best weapons against transnational crime. The close cooperation of states in criminal matters is required in view of the minimum rights to which each accused is entitled. While the growth of transnational and organized crime requires better cooperation among governments, such increased cooperation should also safeguard human rights and the right of defendants to a fair trial.

II. PROCEDURAL CONSIDERATIONS IN NEGOTIATING CRIMINAL AGREEMENTS

A. Earlier Opportunity for Congressional Input into Treaty Negotiations

In order to assure full and timely Congressional input, and avoid potential surprises during the ratification process on MLATs, and other treaties relating to international criminal cooperation, the Departments of Justice and State should regularly brief Congressional Committees on the status of treaty negotiations, and particularly inform them of difficult and unusual issues. The briefing should include long-range strategy and individual negotiations. Normally, after two governments engage in difficult negotiations and make compromises in order to reach an agreement, it is politically and practically impossible for the signatory

Governments to make significant changes in the instrument, even if Congress recommends against ratification. For instance, the failure of the U.S. Department of Treasury to properly advise the concerned Congressional Committees has recently resulted in ratification problems with a pending tax treaty.

B. Earlier Opportunity for Public Comment on Treaty Ratification and/or Negotiation

One pattern that has arisen in the ratification process of MLATs is that many months after the signing of MLATs, the United States Government does not make their contents or their technical analyses available to the public. As a result, the Senate begins its consideration of the ratification process without the input of many organizations and individuals who are unable to obtain the documents. Although one of the reasons proffered for the non-release of such documents is to protect the confidentiality desired by our treaty partners, virtually each of the six treaty partners has released the MLATs. Several of them have also issued press releases. The Committee should require an early release of the MLATs and other relevant documents, such as the technical analyses, so that the public has a meaningful opportunity to provide the Committee with their views. The Department of Justice should consider briefing interested members of the public about pending negotiations and solicit the views of experts on provisions and policies that may assist such negotiations. The Treasury uses this briefing format in its tax treaty negotiations.

C. Need for Comprehensive Legislation on International Criminal Agreements

Mutual Legal Assistance Treaties (MLATs) are so important and the process of negotiating and ratifying treaties is so time consuming that Congress should review and supplement existing legislation with a body of procedural and substantive rules governing all forms of international cooperation in criminal matters. In some cases where other governments reciprocate, the United States should cooperate in the absence of treaties. Indeed, the Swiss Governments has such legislation.[3] Its legislation embraces all procedures of international cooperation in criminal matters, especially extradition, judicial assistance, transfer of proceedings, and the execution of foreign criminal judgments. The enactment of such comprehensive legislation in the U.S. will dispense with the need to rely so much on MLATs. The U.S. would still need to negotiate MLATs with governments with which it has a lot of requests and special needs. Comprehensive legislation would enable the U.S. to handle the routine requests from governments which reciprocated to our requests for cooperation. The legislation in the United States regulating judicial assistance in criminal matters has undergone a comparatively slow development. Traditionally, the U.S., like most common law countries, has only provided assistance in criminal matters and extradited individuals through agreements. The U.S. has been comparatively slow to

negotiate agreements on mutual assistance in criminal matters. The only other process whereby the U.S. now grants judicial assistance, i.e., letters rogatory, is so cumbersome and time-consuming that many litigators do not believe that this procedure is worthwhile for much evidence. Several governments, including those within the British Commonwealth of Nations, have departed from reliance on bilateral treaties through the enactment of uniform legislation and/or joining multilateral conventions. The adoption by Congress of legislation for rendering mutual assistance in criminal matters and other cooperation in international criminal matters will enable us to comply with many requests.

III. SCOPE OF MLATs

Our Government cannot expect to conclude MLATs, and expect that the other governments will implement in a manner conducive to our interests, unless it shows deference and comity to these other governments. In particular, we cannot handcuff our negotiators by demanding that certain crimes, such as acid rain, be off limits. If we begin to exclude such offenses from the list of extraditable crimes, then we must accept the fact that other countries will also want to exclude specific crimes from coverage by the MLAT. The trend is that, as public international law and international criminal law develop together, they will increasingly interact and merge. Not surprisingly, transgressors of wildlife and environmental law are subject to the regime of international criminal law. (I.e., Annex, proposed U.S.-Canada MLAT).[4] In order for international criminal law to encompass new forms of transnational crime, our MLATs must be flexible.

It is disappointing that the U.S.-Cayman MLAT does not cover fiscal matters or any conduct not punishable by imprisonment of more than one year. Unfortunately the proposed U.S.-Bahamas MLAT also has a very limited scope. It applies only to five categories of crimes and specifically excludes tax matters. Nevertheless, limited MLATs are better than no MLATs. For instance, the U.S. initially had mini-MLATs, really protocols to the Single Narcotics Convention, with the Bahamas and the Cayman Islands. The cooperation under the protocol led to the conclusion of a fuller MLAT. Governments with an offshore financial sector necessarily want to safeguard such an important sector. Hopefully, the U.S. can provide leadership in concluding MLATs with a broad scope of offenses. In this regard, the proposed U.S.-Belgium MLAT is a model since it applies to "any offense under the laws of the Requesting State" unless otherwise provided by the treaty. Only by expanding international agreements, even on limited criminal cooperation matters, can we assure increased cooperation.

IV. ACCESS FOR CRIMINAL DEFENDANTS TO MLATS

Defendants in criminal cases should have access to the MLATs. Without equal access to the compulsory process for obtaining evidence from abroad afforded by these treaties, defendants in

criminal cases will be at a significant disadvantage in litigating. Regardless of whether the United States Government is constitutionally required to afford defendants access, it should as a matter of basic fairness give defendants in U.S. courts equal access. Forcing defendants to rely on letters rogatory or other means will result in the same limitations which the United States Government faces when it tries to obtain information from countries with which it does not have an MLAT. The insertion of an understanding that defendants in U.S. criminal cases can have access to the MLAT or alternatively an exchange of notes between the contracting parties should accomplish the objective of affording access to criminal defendants. Forms of international cooperation should always take into account internationally protected human rights and our own civil liberties and notions of fair play.

V. RIGHT TO CROSS-EXAMINE WITNESSES IN MEXICO

The U.S.-Mexican MLAT authorizes, but does not guarantee, the right of cross-examination of deposition testimony taken in Mexico. Whenever possible, U.S. MLATs should guarantee this right. Mexican officials have advised U.S. negotiators that direct and cross examination of witnesses by U.S. prosecutors and defense counsel rather than Mexican officials would violate Mexican law and render the Treaty unratifiable in Mexico. Clearly the benefits of a treaty with Mexico outweigh the disadvantages of the inability of U.S. persons to directly examine witnesses. The Committee should monitor the implementation of the proposed U.S.-Mexico MLAT to ensure that this provision is implemented properly and in good faith.

VI. NEED FOR PROBABLE CAUSE BEFORE MAKING A REQUEST

One issue which has been raised is when a requesting government should demonstrate probable cause in order to obtain documents under MLATs. Probable cause must be shown only when required under U.S. or another contracting party's law. MLATs are designed to assist in criminal proceedings. They embrace all matters which in some way are closely connected with criminal proceedings, such as retrials, clemency proceedings, probation hearings and so forth. The use of prosecution departments both in the requesting and requested state and the application of general provisions of criminal procedure in executing the request for judicial assistance are due to practical considerations. They do not transfer the judicial assistance proceedings into criminal proceedings, not even where the provisions for international judicial assistance are contained in the code of criminal procedure. Criminal proceedings in the state in which they occur presuppose a right of prosecution by that state, whereas judicial assistance proceedings arise from the principles of international law and agreements. Their object is to enforce a sovereign's right of prosecution. In existing U.S. MLATs a requesting state can ask for search and seizure in the requested

state, provided that such a request contains information that would justify such action under the laws of the requested state. A request to the United States would require a showing of probable cause for search and seizure. A request by the United States correspondingly must meet the proper evidentiary standard in the requested state [i.e., proposed U.S.-Canadian MLAT, Art. XIV(1)].

VII. SAFE CONDUCT FOR WITNESSES

The pending MLATs provide for safe conduct of persons from a requesting state who, pursuant to the execution of a request, testify in a requested state. Such persons are free from service of process, prosecution, suit, detention, or subjection to any restriction of personal liberty by reason of any acts which preceded his departure from the requested state. In other U.S. MLATs a person summoned before a proceeding in the requesting state to answer for acts that are the subject of proceedings against him has safe conduct, but only with respect to acts that are not specified in the request. Subsequent crimes committed in the requesting state can be prosecution. In all U.S. MLATs, including the six now pending, safe conduct ceases if after a certain amount of days upon notification that his presence is no longer required, the person has not left the territory or he voluntarily returned after leaving. On balance it seems that safe conduct provisions should be included in a protocol to the Mexico and Canada MLATs and in future MLATs, since they would provide additional mechanisms to encourage witnesses to voluntarily appear and testify in the requesting country.

VIII. WORKING GROUPS AND PERIODIC EVALUATION

A provision contained in some of the pending MLATs obligates the signatory governments to consult as appropriate to develop additional specific agreements or arrangements, formal or informal, on mutual legal assistance. They may agree on practical measures as may be required to facilitate the Treaty's implementation. (Proposed Canada-U.S. MLAT, Art. XVIII; and Proposed Bahamas-US MLAT, Art. 19). Similarly, the proposed Mexican-U.S. MLAT provides that the signatory governments will meet at least every two years in order to review the effectiveness of the MLAT's implementation and to agree on "whatever individual and joint measures are necessary to improve its effectiveness." (Proposed Mexican-U.S. MLAT, Art. 18).

The requirement of a review and the establishment of working groups is essential and provides for a mechanism whereby law enforcement officials can review needs for improved measures to adjust to whatever circumstances exist in criminality and enforcement techniques in each of the countries. One of the most dynamic results of the Italy-U.S. MLAT has been periodic meetings of joint working groups. Recently, they held their sixth conference since the working group was formed in 1984.[5] They have developed a series of major law enforcement programs on arms trafficking, organized crime, drug trafficking, and terrorism. As a result of the working groups, the two governments are exchanging information

and technology and have cross-training of law enforcement agents in the two countries and have begun other exchange programs involving magistrates and judges. Most recently, the working group has reviewed the results of organized crime trials and how to continue to support their efforts against organized crime. Hence, the inclusion of a provision to establish a working group and review mechanism is essential to continued improvement of law enforcement cooperation. Unfortunately, not all of the pending MLATs have such provisions.

IX. NEED FOR REGIONAL MECHANISM FOR INTERNATIONAL CRIMINAL COOPERATION

The United States Congress under the leadership of this Committee and the Judicial Committees, and the United States Executive should help build strong regional mechanisms to combat transnational crime. We should make an active effort to participate in regional groups which design and negotiate multilateral conventions, such as the European Committee on Crime Problems. In this connection, the decision of the U.S. to sign the European Convention on the Transfer of Prisoners was an example of how the United States realized criminal cooperation with several of our most important allies by signing one instrument.

MLATs are only one small instrument whereby our criminal justice system seeks help in litigating transnational crimes. Our law enforcement officials are battling individuals and organizations that have superior resources and whose activities are not constrained by the sovereignty of nation-states. If our and other concerned Governments are to successfully battle organized crime and improve the administration of justice, the United States policy-makers must meet daily with their counterparts in the region. They must be able to discuss on-going investigations, extradition requests, assistance in pending trials, transfer of prisoners, enforcement of judgments, and so forth. They must be able to discuss leading types of crime: crimes against peace; war crimes; narcotics; trafficking of arms and controlled goods and data; and organized crime. To do this effectively, we need a regional body where governments are represented at the Assistant Attorney General level. They would devote attention to international agreements which require drafting, ratification, and amendment, and ways to improve all aspects of criminal justice. That body would benefit from existing regional organizations that are active in these matters [i.e., the Caribbean and Latin American Interpol groups, the U.N. Committee for the Prevention of Crime and Treatment of Offenders (ILANUD), and the Organization of American States through the Inter-American Drug Abuse Committee (CICAD)]. The body would coordinate its activities with regional organizations such as the Caribbean Common Market and Community and the Administration of Justice Projects in Central America and the Caribbean.[6]

This Committee and our Departments of Justice and State should cooperate actively with international governmental organizations, nongovernmental organizations (i.e., bar associations in the U.S., including Committee on International Criminal Law, Section of International Law & Practice, American Bar Association, and the National Association of Criminal Defense Lawyers, and the International Chiefs of Police), and international non-governmental organizations (i.e., Association Internationale de Droit Penal--AIDP) active in international criminal justice. These organizations have technical expertise and resources which can supplement enormously the efforts of our Government. Unless our Government deals with MLATs in the context of a program for the administration of justice in general, it is not seeing the forest from the trees. As time passes, the criminal forces will continue to rise and their unchecked growth may either cover or block our path out of the forest of transnational criminality.

X. SUMMARY AND CONCLUSION

The MLAT process in the United States requires improvement. This Committee should take a leadership role. I applaud the fact that the Committee has already taken the time to consider the various implications of MLATs. Hopefully, in cooperation with our Executive agencies and with the members of the public that deal with criminal justice, this Committee will assist our Government in making dynamic efforts in international criminal cooperation. In the meantime, the Committee should give its advice and consent to the pending MLATs with the action recommended in this statement. Despite the shortcomings in some agreements, I urge the Committee to approve all six pending MLATs.

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*Partner, Berliner & Maloney; chairman, Committee on Criminal Law and Procedure, Inter-American Bar Association; chairman, Committee on International Taxation, Section of International Law & Practice, American Bar Association; editor, International Enforcement Law Reporter; and registered agent for the Government of Barbados. This statement is made solely at the request of the Committee and is not for any of the above-mentioned organizations.

1 The controversies giving rise to this hearing are summarized in Zagaris, Senator Helms' Inquiries over Individual Rights in MLATs Delay Mark-up, 4 INTERNATIONAL ENFORCEMENT LAW REPORTER 160 (May 1988).

2 For a discussion of the prospective interaction of the proposed U.S.-Bahamian MLAT and the Lehder case, see Zagaris, Lehder Conviction Calls Into Play Proposed Bahamas MLAT, 4 INTERNATIONAL ENFORCEMENT LAW REPORTER 151 (May 1988).

3 Federal Act on International Mutual Assistance in Criminal Matters (IMAC) of March 20, 1981. See translation by Frei in Fedders et al (eds.), TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 492 (1984).

4 For a useful discussion of trends in international criminal law and international environmental law, see McCaffrey, Crimes against the Environment, Bassiouni (ed.), I INTERNATIONAL CRIMINAL LAW CRIMES 541-61 (1986).

5 For a discussion of the formation of the working group, see Meese Addresses Italy-USA-Switzerland Conference, 1.2 INTERNATIONAL ENFORCEMENT LAW REPORTER 29 (Oct. 1985); for a discussion of expansion of the cooperation, see U.S. and Italy Expand Cooperation, 4 INTERNATIONAL ENFORCEMENT LAW REPORTER 83 (March 1988).

6 The potential for international criminal cooperation between regional organizations in the Americas and the need for a new world paradigm in international criminal matters is discussed in Zagaris and Papavizas, Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering, 57 REVUE INT'L DE DROIT PENAL 117-33 (1986).

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